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# OF GAMETES AND GUARDIANS: THE IMPROPRIETY OF APPOINTING GUARDIANS AD LITEM FOR FETUSES AND EMBRYOS

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*Abstract*: Recent advances in medical technology have caused some commentators and courts to perceive fetuses and embryos as separate entities, with rights independent of the women who carry them. Conduct of pregnant women that has been perceived to conflict with the interests of the fetuses they carry has been called into question. In some cases, courts have been forced to determine the juridical status of fetuses and embryos; in others, courts have appointed guardians ad litem to represent the "best interests" of these entities. This Article maintains that appointing guardians ad litem for fetuses and embryos is inappropriate. Fetuses and embryos are not accorded the same status as existing persons under constitutional law. Protecting such entities, which are completely dependent on the women who carry them, violates the privacy rights of pregnant women. Moreover, existing child abuse legislation, under the auspices of which some courts have appointed guardians ad litem for fetuses, is not designed to operate in the in utero context. The "geography of pregnancy" suggests that fetal interests should not be used to restrict the right of pregnant women to enjoy privacy and bodily autonomy.

Legal conflicts between a woman and the fetus she carries were relatively rare before the advent of sophisticated medical technology.[1] Recent scientific advances, however, now allow us to observe the fetus in utero, to test amniotic fluid and chorionic villus to determine genetic defects and, in some cases, to provide therapy when problems are discovered. At the same time, researchers have identified and documented the dangers of drinking alcohol, smoking cigarettes and using drugs during pregnancy. Physicians are now also able to assist infertile couples through the use of in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer and embryo freezing. These new technologies permit the creation of extra-uterine embryos.

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1. Efforts to control women because their actions might affect the fetus predate the expansion of medical technology. *See e.g.*, Muller v. Oregon, 208 U.S. 412 (1908). The advent of sophisticated medical technology has dramatized the potential for conflict.

As a result of these developments, some courts have begun to perceive a divergence of interests between woman and fetus. Problems regarding the disposition of extra-uterine embryos have also recently arisen. The legal status of these embryos is of enormous legal and ethical concern. If embryos are accorded the legal status of juridical persons, the next step courts may take is to appoint guardians ad litem to represent the best interests of these embryos.

This Article examines the propriety of appointing guardians ad litem for fetuses and embryos. This Article maintains that applying traditional rules governing the appointment of guardians ad litem to fetuses and embryos is inappropriate. Current legal theories do not accord to the fetus or embryo the status and legal protections afforded to children. Because a fetus is physically dependent upon and resides within the woman carrying it, according such entities independent legal rights threatens the privacy and autonomy of pregnant women. Since guardians appointed to represent children are granted deferential treatment in representing the "best interests" of the child, appointing guardians ad litem in these circumstances potentially transforms pregnancy into a legally adversarial relationship between woman and fetus. Ironically, it might also have the effect of driving women away from health care which would benefit both woman and fetus.

Part I of this Article outlines existing approaches to the appointment of guardians ad litem. First, it examines the issue with reference to child abuse and neglect statutes; second, it examines the issue in the context of appointments for incompetent individuals; lastly, it examines the issue in the trust context. Part II of the Article outlines the role medical technology has played in encouraging physicians and judges to view the fetus as an entity separate from the woman carrying it. Part II also examines advances in infertility research which have led to the creation of extra-uterine embryos and examines the impact of our nation's drug war on the rights of pregnant women. Part III provides a brief overview of the status of the fetus at common law; Part IV discusses the right to privacy; Part V discusses recent cases in which guardians ad litem have been appointed to represent fetal interests because of a perceived conflict between a woman's behavior and the interests of the fetus; and Part VI discusses the impropriety of appointing guardians ad litem in these cases. Finally, Part VII explores the ramifications of grafting procedures used for appointing guardians ad litem for children to fetuses and embryos.

## I. THE APPOINTMENT OF GUARDIANS AD LITEM

Traditionally, guardians ad litem are appointed to represent the interests of individuals who are incompetent to represent themselves in legal proceedings,[2] and where a potential conflict exists between the usual decisionmaker and the individual whose interests are at stake.[3] For example, a guardian ad litem may represent a child in abuse or neglect proceedings, or in proceedings regarding the termination of parental rights.[4] Courts may likewise appoint a guardian ad litem when parents are deemed to be acting contrary to their children's medical interests.[5] Guardians ad litem also represent the rights of

2. A guardian ad litem is appointed by the court "to prosecute or defend, in behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation." BLACK'S LAW DICTIONARY 635 (5th ed. 1979). The guardian ad litem is often appointed under a state's rules of civil procedure, *see* Note, *Guardians Ad Litem,* 45 IOWA L. REV. 376, 376 n.4 (1960), or under its probate codes and mental health codes, Solender, *The Guardian Ad Litem: A Valuable Representative or Illusory Safeguard?,* 7 TEX. TECH. L. REV. 619, 620 (1976). The use of a guardian ad litem dates back to the Roman Empire. *Id.* at 619. English common law required the appointment of a guardian ad litem for children and incompetents. *Id.* at 620. Some states adhere to the old view, requiring that the child be a party to the proceeding before appointing a guardian ad litem. *See* Comment, *Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians Ad Litem,* 12 CREIGHTON L. REV. 234, 234 n.6 (1978). For a discussion of circumstances in which the appointment of a guardian ad litem for a child is appropriate, see generally Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings,* 11 HARVARD C.R.-C.L. L. REV. 565 (1976) (juvenile proceedings, mental hospital commitments, custody disputes, paternity suits, parens patriae actions to compel medical treatment, or education).

The role of the guardian ad litem is distinguishable from the role of an advocate. The guardian ad litem represents the best interests of the individual, regardless of the individual's preferences. An advocate, on the other hand, is a proponent of the individual's point of view, regardless of the advocate's own opinion of the propriety of the course of action. Unfortunately, the nomenclature in this area is often muddled, and legislation may call for the appointment of a guardian ad litem, but describe the role properly fulfilled by an advocate. In Maine, for example, the guardian ad litem represents the best interests of the child, but must make known the wishes of the child "regardless of the recommendation of the guardian ad litem." ME. REV. STAT. ANN. tit. 22, § 4005.1.B–.E (Supp. 1990).

3. Conflicts may arise due to accusations against the usual decisionmaker in abuse and neglect cases. *See* Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases,* 23 VILL. L. REV. 521, 527–29 (1977–1978). Competing financial interests may necessitate an appointment. *See, e.g.,* Cooper v. Liverman, 406 S.W.2d 927, 931 (Tex. Civ. App. 1966). For a discussion of the use of guardians ad litem in divorce and custody matters, see generally Levin, *Guardian Ad Litem in a Family Court,* 34 MD. L. REV. 341 (1974).

4. *See infra* notes 20–23 and accompanying text.

5. *See infra* notes 20–23 and accompanying text.

incompetents in medical treatment cases,[6] and the rights of incompetents, minors and unborn generations in trust and estate dispositions.[7]

Courts derive authority to appoint guardians ad litem from statutory provisions, procedural rules and their own inherent equity power.[8] While the role of a guardian ad litem is often ill-defined,[9] the typical standard requires the guardian to represent the "best interests" of the incompetent individual.[10] The guardian ad litem is also frequently considered an officer of the court.[11]

### *A. Guardians Ad Litem for Children*

Parents are generally viewed as the appropriate decisionmakers in matters concerning the health and well-being of their children.[12] Our legal system presumes that parents will act to protect their children's

6. *See infra* notes 31–37 and accompanying text.

7. *See infra* notes 24–30 and accompanying text.

8. *See, e.g.,* Jenkins v. Whyte, 62 Md. 427, 433 (1884); Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866, 867 (1967); Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185, 191 (1965); FED. R. CIV. P. 17(c); MD. EST. & TRUSTS CODE ANN. §§ 9–109, 13–501, 13–502 (1974). One court indicated that inherent powers to appoint a guardian ad litem could be invoked whenever "there are interests of a minor to be protected." Zinni v. Zinni, 103 R.I. 417, 421, 238 A.2d 373, 376 (1968). Judge Levin, on the other hand, argues that while equity enables a judge to appoint a guardian ad litem, statutory authorization is more appropriate. Levin, *Guardian Ad Litem in a Family Court,* 34 MD. L. REV. 341, 364–65 (1974).

9. Solender, *supra* note 2, at 638.

10. Findlay v. Findlay, 240 N.Y. 429, 148 N.E. 624 (1925). As Judge Levin postulates:

> The function of the guardian ad litem would be to assist the trial judge in any proceedings which may effect the children. . . . Thus the primary responsibility of the guardian ad litem would be to accurately present the true needs of the child and, thereby establish the 'best interest' test as a suitable formulation for ensuring a child's welfare.

Levin, *supra* note 8 at 362. Exactly what is in the best interests of the child may be open to debate.

> In a contested situation [the guardian ad litem] will be faced with at least three interpretations of this standard: the welfare agency's, the parents' or present custodians', and his own. Even if his interpretation is the same as one of the others, it is not necessarily the right one by virtue of some majority rule concept.

Solender, *supra* note 2 at 639. Additional interpretations may be held by the court, the child and society. Calls have been made for more clearly defined guidelines to assist the guardian ad litem. *See, e.g.,* Comment, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience,* 58 WASH. L. REV. 853, 867–69 (1983).

11. Comment, *supra* note 2, at 253. As a result, the guardian ad litem may act as an arm of the state, exercising the state's interests as parens patriae. *See* A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT 54 (1975).

12. Prince v. Massachusetts, 321 U.S. 158, 166, (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents."); *see* Bowen v. American Hosp. Ass'n, 476 U.S. 610, 627 n.13 (1986); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Parkham v. J.R., 442 U.S. 584 (1979).

interests.[13] Parental autonomy, however, is not absolute.[14] The state, as parens patriae, has an obligation to protect the welfare of children, an obligation which may at times supersede parental authority.[15] The basis for the state's authority stems from its interest in protecting those incapable of assuring their own welfare and in protecting societal well-being.[16] Thus, the state will intervene when it perceives that a parent has acted in a manner that contravenes the state's protective obligations.[17] Because the parental responsibility is deemed primary, courts generally will not appoint a guardian ad litem unless the threat to the child is perceived to be substantial.[18] This principle is evident in medical cases, for example, where courts have traditionally intervened only where medical treatment was considered essential.[19]

Federal and state statutes require the appointment of a guardian ad litem in any judicial action involving suspected abuse or neglect. The Child Abuse Prevention and Treatment Act of 1974[20] (Child Abuse Act) required each state to enact legislation providing for the appoint-

13. Parents now have what is viewed as a presumptive right to decide matters concerning their children. Fraser, *The Parent and the Child: A Delicate Balance of Power?*, in CHILD ABUSE AND NEGLECT: THE COMMUNITY AND THE FAMILY (C. Kempe & R. Helfer eds. 1976); Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 17, 26 (1976). Sometimes this perception is based on societal views of appropriate parental actions rather than actions that present a real danger of injury to the child. *See generally*, Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990).

14. Custody of Minor, 378 Mass. 732, 393 N.E.2d 836, 843 (1979):

> [T]he parental right to control a child's nurture is grounded not in any absolute property right which can be enforced to the detriment of the child, but rather, is akin to a trust, subject to a correlative duty to care for and protect the child, and terminable by the parents' failure to discharge their obligations.

15. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); *In re* Phillip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48, 51 (1979), *cert. denied*, 445 U.S. 949 (1980).

16. *See, e.g.*, Kleinfeld, *The Balance of Power Among Infants, Their Parents, and the State*, 5 FAM. L.Q. 63, 107 (1971); Note, *A Case for Independent Counsel to Represent Children in Custody Proceedings*, 7 NEW ENG. L. REV. 351, 352 (1972).

17. *See, e.g., In re* Phillip B., 156 Cal. Rptr. at 51; *In re* Seiferth, 309 N.Y. 80, 127 N.E. 2d 820, 823 (1955); *In re* Hudson, 13 Wash. 2d 673, 680, 126 P.2d 765 (1942). In many of these cases the courts use neglect theories to authorize state intervention. Richards v. Forrest, 278 Mass. 547, 180 N.E. 508, 510 (1932).

18. *Cf.* Mariner, Glantz & Annas, *Pregnancy, Drugs, and the Perils of Prosecution*, 9 CRIM. JUST. ETHICS 30, 35 (1990) [hereinafter Mariner].

19. *See, e.g., In re* Seiferth, 127 N.E.2d at 823; *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972); *In re* Tuttendario, 21 Pa. D. 561 (1912). Some courts have expanded the inquiry in medical cases and have intervened in less serious circumstances. *See, e.g., In re* Karwath, 199 N.W.2d 147 (Iowa 1972); *In re* Sampson, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970).

20. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106 (1988)).

ment of a guardian ad litem in abuse and neglect proceedings.[21] Federal funding for child abuse prevention programs was tied to the state's enactment of these provisions.[22] In 1984, Congress amended the Act to provide for the appointment of a guardian ad litem in cases where medical neglect or withholding of treatment had allegedly occurred.[23]

### *B. Guardians Ad Litem in Trusts, Estates and Probate*

The use of a guardian ad litem is prevalent in trust, estate and probate proceedings.[24] Almost all states have statutes, court rules, or procedural statutes authorizing courts to appoint a guardian ad litem in such proceedings to protect the interests of minors, incompetents, unborn beneficiaries, persons unascertained and persons whose location is unknown.[25] In addition, courts have declared their inherent authority to appoint such guardians.[26]

As is true in other contexts, the guardian ad litem's role in estate, trust and probate proceedings is not clearly defined.[27] Appointment is

21. The Act provides: "That in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceeding." *Id.* § 5203(b)(2)(G) (1988). State definitions of child abuse and neglect generally include the infliction of physical or mental injury, including sexual abuse, neglect, or maltreatment of a child. *See, e.g.,* COLO. REV. STAT. § 19-10-103 (1987). For a discussion of definitions, see Fraser, *supra* note 13, at 19–20 (1976). For examples of definitional variations in the state statutes, see, e.g., ARK. STAT. ANN. § 9-30-103(3) (1987); IDAHO CODE § 1602(a)(1)–(2) (Supp. 1990); IOWA CODE ANN. § 232.68(1), (2)(a)–(2)(d) (West 1984); MD. FAM. LAW CODE ANN. § 5-701(b)(1)–(2) (Supp. 1990); MO. REV. STAT. § 210.110(l)(5) (1990); N.M. STAT. ANN. § 32-1-3.M (Supp. 1988); OR. REV. STAT. § 418.740(1)(a)–(f)(1985); 11 PA. CONS. STAT. ANN. § 2203 (Purdon 1988).

In most states, a child is defined as "a person under the age of eighteen." *See, e.g.*, COLO. REV. STAT. § 19-103-(4) (1987).

22. 42 U.S.C. § 5103(b)(2). Many states already had statutes providing for the mandatory appointment of guardians ad litem in abuse and neglect cases. Colorado was the first state to require such appointments. COLO. REV. STAT. § 22-10-8 (1963). The statute has since been revised. COLO. REV. STAT. § 19-10-103 (1987).

23. Child Abuse Amendments of 1984, Pub. L. No. 98-457, § 122, 98 Stat. 1749, 1752 (codified as amended at 42 U.S.C. § 5106(b)(10)(C)).

24. Begleiter, *The Guardian Ad Litem in Estate Proceedings,* 20 WILLAMETTE L. REV. 643, 644 (1984).

25. *Id.* at 645, 647 n.28.

26. *Id.* at 649. In *Hatch v. Riggs National Bank,* the court stated:

> Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians ad litem. The efficacy of a guardian ad litem appointed to protect the interests of unborn persons is no different whether he be appointed pursuant to statute or the court's inherent power. Given such protection, the equitable doctrine of representation embraces the flexibility, . . . to act upon the interests of unborn contingent remaindermen to the same effect as if they had been sui juris and parties.

361 F.2d 559, 565–66 (D.C. Cir. 1966) (citations omitted).

27. Begleiter, *supra* note 24, at 663.

made for the limited purpose of the litigation at hand.[28] In many respects the guardian ad litem acts as an attorney in advancing the interests of the client.[29] Some courts view the guardian ad litem as an officer of the court, with the court retaining the primary obligation to protect the incompetent.[30]

### C. *Guardians Ad Litem for Incompetents*

Typically, medical treatment decisions concerning an incompetent individual are made by family members; however, if no relatives are available,[31] if conflicts between family members exist,[32] or if family members are perceived to be acting contrary to the best interests of the incompetent, a guardian ad litem may be appointed.[33] In such cases, the guardian must be more than a mere advocate; often the guardian ad litem is charged with objective fact finding and furthering the work of the court.[34]

In termination of treatment cases, many courts originally required the appointment of a guardian ad litem.[35] Following the lead of the

28. *Id.* at 714–15.

29. *In re* Curley's Estate, 61 Misc. 391, 293 N.Y.S. 370, 378 (Sur. Ct. 1936); *In re* Schrier's Will, 157 Misc. 310, 283 N.Y.S 233, 235 (Sur. Ct. 1935). *But cf. In re* Estate of Roe, 65 Misc. 2d 143, 316 N.Y.S.2d 785, 789 (1970) (although a guardian ad litem acts as an attorney in many respects, the guardian has a concurrent obligation to the court which an attorney does not have).

30. G. WOERNER, THE AMERICAN LAW OF GUARDIANSHIP (1897); Begleiter, *supra* note 24, at 715.

31. A guardian ad litem may be appointed when family members cannot be located. *See, e.g., In re* Weberlist, 79 Misc. 2d 753, 360 N.Y.S.2d 783, 785 (Sup. Ct. 1974); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 433 (1977) (addressing the right of an incompetent individual to refuse life-prolonging measures).

32. Adelman v. Graves, 747 F.2d 986, 988 (5th Cir. 1984) (when conflict of interest between guardian and incompetent is alleged, guardian ad litem should be appointed).

33. *See* Model Statute, An Act to Revise the Methods, Criteria and Procedures for Protecting Partially Disabled and Disabled Persons and Minors and the Property of Such Persons and Minors; to Establish the Criteria for Appointing Limited Personal Guardians, Personal Guardians, Limited Conservators and Conservators and Their Duties and Powers; and to Specify the Rights of Individuals Subject to Intervention Proceedings and Dispositional Orders, § 34(5)(b), in SALES, POWELL, VAN DUIZEND & ASSOCIATES, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 601 (1982). The model statute also lays out the role of the guardian ad litem. *Id.* at 599–601. Federal Rule of Civil Procedure 17(c) allows for the appointment of a next friend or guardian ad litem. 3A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 17.26, at 17–210 (1987); *see, e.g.,* Von Bulow v. Von Bulow, 634 F. Supp. 1284, 1293 (S.D.N.Y. 1986); *see also* 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1572 at 512 (2d ed. 1990).

34. *See* Begleiter, *supra* note 24, at 714–15.

35. *See, e.g., In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983), *modified, In re* Hamlin, 102 Wash. 2d 810, 689 P.2d 738 (1984).

court in *In re Quinlan*,[36] however, some courts have abandoned the requirement of a guardian ad litem under some circumstances.[37]

## II. MEDICAL AND TECHNOLOGICAL DEVELOPMENTS

### *A. Prenatal Screening*

The tendency to view the fetus as a separate person, with potentially divergent interests from those of the woman carrying it, has received impetus from recent advances in prenatal screening and treatment procedures which increasingly enable doctors to ascertain, and sometimes even treat, fetal abnormalities. Some problems discoverable by prenatal screening may be amenable to treatment while the fetus is still in utero.[38] Amniocentesis, chorionic villus sampling (CVS), and ultrasonagraphy are now commonly used when prenatal diagnosis is considered medically necessary.[39] Courts, responding to requests for intervention by physicians, rely on medical testimony about the status of the fetus and the available therapies.[40] These technologies will be surveyed briefly below.

CVS sampling, a first trimester prenatal diagnostic test designed to identify genetic abnormalities,[41] has become widely available in the past few years.[42] An ultrasound-guided catheter is used to obtain a sample of chorionic tissue from the developing placenta.[43] The early timing of the CVS procedure is of great benefit to women seeking pre-

36. 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

37. John F. Kennedy Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984); *In re* Hamlin, 102 Wash. 2d 810, 689 P.2d 1372 (1984).

38. S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 243–50 (1987).

39. Another diagnostic technique used prenatally is fetoscopy. *Id.* at 136–37.

40. *See, e.g., In re* A.C., 533 A.2d 611, 612–13 (D.C. 1987), *vacated,* 573 A.2d 1235 (1990).

41. CVS involves obtaining cells from the developing placenta (called the chorion) in order to test for genetic abnormalities and chromosomal defects. Testing usually occurs between the ninth and twelfth week of pregnancy. Rhoads, Jackson, Schlesselman, De La Cruz, Desnick, Golbus, Ledbetter, Lubs, Mahoney, Pergament, Simpson, Carpenter, Elias, Ginsberg, Goldberg, Hobbins, Lynch, Shiono, Wapner & Zachary, *The Safety and Efficacy of Chorionic Villus Sampling for Early Prenatal Diagnosis of Cytogenetic Abnormalities,* 320 NEW ENG. J. MED. 609 (1989) [hereinafter Rhoads].

42. *See* Department of Obstetrics & Gynecology, Tietung Hosp. of Anshan Iron & Steel Co., *Fetal Sex Prediction by Sex Chromatin of Chorionic Villi Cells During Early Pregnancy,* 1 CHIN. MED. J. (N.S.) 117 (1975) (Eng.). The first procedures were attempted only a few years ago. Brambati & Simoni, *Diagnosis of Fetal Trisomy 21 in First Trimester,* 1 LANCET 586 (1983).

43. Because the chorionic tissue is derived from the fertilized egg, diagnosis is equally accurate. Rhoads reported a 97.8% accuracy rate versus a rate of 99.4% for amniocentesis. Rhoads, *supra* note 41, at 609.

natal diagnosis. If chromosomal abnormalities are discerned, a first trimester abortion can be performed.[44]

Amniocentesis is the retrieval of amniotic fluid via needle aspiration under ultrasound guidance.[45] Because the procedure requires a sufficient amount of amniotic fluid for aspiration, the procedure is usually not performed until the fifteenth or sixteenth week of pregnancy.[46] Fetal cells are then cultured to determine the presence of chromosomal abnormalities.[47] Consequently, results may not be available until the nineteenth week.[48] Amniocentesis is nearly 100% accurate in detecting chromosomal abnormalities.[49]

Ultrasonography utilizes high frequency soundwaves that transmit echoes from density shifts.[50] Although it has only been in use for two decades, ultrasound has become very useful in identifying fetal abnormalities.[51] The list of fetal abnormalities potentially identifiable by ultrasound is extensive.[52]

### *B. Fetal Therapies*

Most congenital abnormalities detectable through the use of prenatal screening are not yet amenable to corrective treatment. Some therapies deemed to benefit the fetus do, however, exist, and can be provided in utero via the woman.[53] These treatments include transfu-

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44. Abortions during the second trimester entail greater maternal risk, expense and psychological stress. S. ELIAS & G. ANNAS, *supra* note 38, at 131. It is interesting to note that in 1987, at the time the book was written, CVS was still an investigative procedure. *Id.*

45. *See, e.g.*, J.R. WILLSON & E.R. CARRINGTON, OBSTETRICS AND GYNECOLOGY 34–35 (8th ed. 1987).

46. *Id.*

47. *Id.*

48. *See* S. ELIAS & G. ANNAS, *supra* note 38, at 130; Hodge, *Waiting for the Amniocentesis*, 320 NEW ENG. J. MED. 63 (1989).

49. S. ELIAS & G. ANNAS, *supra* note 38.

50. J.R. WILLSON & E.R. CARRINGTON, *supra* note 45, at 33.

51. S. ELIAS & G. ANNAS, *supra* note 38, at 140–42; J.R. WILLSON & E.R. CARRINGTON, *supra* note 45, at 149. The 1984 National Institute of Health Consensus Conference on Diagnostic Ultrasound Imaging in Pregnancy decided that ultrasound should be used only for "specific medical indication[s]." Consensus Conference, *The Use of Diagnostic Ultrasound Imaging During Pregnancy*, 252 J. A.M.A. 669, 672 (1984). However, ultrasound use is increasing "for a wide variety of obstetrical indications." Elias & Annas, *Routine Prenatal Genetic Screening*, 317 NEW ENG. J. MED. 1407, 1408 (1987).

52. *See* Sabbagha, Shiekh, Tamura, DelCompo, Simpson, Depp & Cerbie, *Predictive Value, Sensitivity, and Specificity of Ultrasonic Targeted Imaging for Fetal Anomalies in Gravid Women at High Risk for Birth Defects*, 152 AM. J. OBSTETRICS & GYNECOLOGY 822, 823 (1985). However, the value of an ultrasound procedure is dependent upon the skill of the examiner and the use of other tests. *Id.* at 827.

53. *See generally* S. ELIAS & G. ANNAS, *supra* note 38, 245–50; Goldberg, *Medical Choices During Pregnancy: Whose Decision Is It Anyway?*, 41 RUTGERS L. REV. 591, 606–07 (1989).

sions,[54] vitamin therapy for metabolic diseases,[55] and glucocortoids to mature fetal lung capacity when premature delivery is imminent.[56] Fetal surgery in utero has also been attempted for hydrocephalus,[57] urinary tract obstructions,[58] and diaphragmatic hernias.[59]

### C. *Infertility Treatments*

Technological advances in methods of assisting reproduction[60] have provided hope for millions of infertile couples.[61] The use of in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT) and zygote intrafallopian transfer (ZIFT), has led to an increase in the prevalence of extra-uterine embryos. As with fetal therapies, these developments have lent impetus to the notion that a fetus is a being with legally protectable interests distinct from those of the woman carrying it.[62]

IVF is typically recommended when the fallopian tubes are blocked or missing, or when low sperm count has prevented conception in utero.[63] The IVF process typically involves hormonal stimulation and subsequent retrieval of the oocytes just prior to ovulation.[64] If fertili-

54. *See* Raleigh Fitken-Paul Morgan Memorial Hosp. v. Anderson 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964).

55. S. ELIAS & G. ANNAS, *supra* note 38, at 263–65.

56. *Id.* at 262.

57. *Id.* at 245–42; *see also* Depp, Sabbagha, Brown, Tamura & Reedy, *Fetal Surgery for Hydrocephalus: Successful in Utero Ventriculoamniotic Shunt for Dandy-Walker Syndrome,* 61 OBSTETRICS & GYNECOLOGY 710 (1983).

58. S. ELIAS & G. ANNAS, *supra* note 38, at 246–48.

59. Harrison, Adzick, Longaker, Goldberg, Rosen, Filly, Evans & Goldbus, *Successful Repair In Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera From the Left Thorax,* 322 NEW ENG. J. MED. 1582 (1990) (reporting successful in utero operation on fetus afflicted with diaphramatic hernia, which is usually fatal).

60. Among the techniques commonly utilized by infertility clinics are artificial insemination (commonly utilized when the male partner is infertile, if inheritance of a genetic defect is feared or if there is no male partner), in vitro fertilization and gamete intrafallopian transfer.

61. Infertility is generally defined as the inability of a couple to conceive after 12 months of intercourse. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 35–36 (1988) [hereinafter OTA REPORT). The Office of Technology Assessment (OTA) reports that between two and three million married couples suffer from infertility. *Id.* at 3. Among the causes of infertility are sexually transmitted diseases, delayed childbearing, maternal infections and environmental toxins. *Id.* at 6–7. For a general discussion of the causes of increasing requests for infertility assistance, see *id.* at 14.

62. *See infra* notes 137–81 and accompanying text.

63. Johnston, Lopata, Pepperell, Trounson & Wood, *The Use of In Vitro Fertilization in the Infertile Couple,* in THE INFERTILE COUPLE 263 (R.J. Pepperell, B. Hudson & C. Wood eds. 1987) [hereinafter Johnston].

64. *Id.* at 281.

zation occurs, the resultant embryos are reinserted into the uterine cavity.[65]

In contrast to IVF, GIFT does not involve fertilization ex utero.[66] After hormonal stimulation of the ovaries to produce oocytes, retrieval is accomplished via the same methods utilized for IVF.[67] The use of GIFT procedures has become widespread in the last five years, with over one hundred infertility clinics reporting the availability of the GIFT procedure.[68] GIFT appears to have a higher rate of success than IVF.[69]

ZIFT is a variation on the GIFT procedure; fertilization occurs in the laboratory and the zygote(s) are reinserted in the fallopian tubes.[70] The ZIFT procedure was first reported in 1988.[71]

The process of cryopreservation, which has been used in conjunction with infertility treatments, permits the freezing of excess embryos for use during future cycles.[72] Pregnancy rates from cryopreserved

65. OTA REPORT, *supra* note 61, at 123. The success rate for in vitro fertilization varies considerably depending on the clinic, but averages about 16%. Medical Research Int'l & the Soc'y for Assisted Reproductive Technology, The American Fertility Society, *In Vitro Fertilization-Embryo Transfer in the United States: 1988 Results From the IVF-ET Registry,* 53 FERTILITY & STERILITY 13, 16 (1990) [hereinafter Medical Research Int'l].

66. OTA REPORT, *supra* note 61, at 141.

67. *Id.* at 123–24.

68. *Id.* GIFT and IVF are often used in tandem. The GIFT procedure is implemented first, then extra oocytes are fertilized in vitro and cryopreserved for later use. Johnston, *supra* note 63, at 264. While the GIFT procedure avoids some problems of extra-corporeal embryos, OTA REPORT, *supra* note 61, at 255, problems may still exist depending on labels applied to when life begins. *See, e.g.,* Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd,* No. 180, slip. op. 6. (Tenn. Ct. App. Sept. 13, 1990).

69. Asch, Balmacedo, Ellsworth & Wong, *Gamete Intrafallopian Transfer (GIFT): A New Treatment for Infertility,* 30 INT'L J. FERTILITY 41 (1988); Molloy, Speirs, DuPlessis, Gellert, Bourne & Johnston, *The Establishment of a Successful Programme of Gamete Intra-Fallopian Transfer (GIFT): Preliminary Results,* 26 AUSTL. & N.Z. J. OBSTETRICS & GYNECOLOGY 206 (1986) (reporting success rates of 29.4%). The higher success rate is probably due to conditions in the fallopian tubes. Johnston, *supra* note 63, at 287–88.

70. Variations in this procedure include pronuclear stage tubal transfer (PROST), tubal embryo transfer (TET) and tubal pre-embryo transfer (TPET). Medical Research Int'l, *supra* note 65 at 17.

71. In 1988, only 20 clinics reported using the ZIFT procedure. *Id.* at 18.

72. Gardts, Roziers, Campo & Noto, *Survival and Pregnancy Outcome After Ultrarapid Freezing of Human Embryos,* 53 FERTILITY & STERILITY 469 (1990); Testart, Lassalle, Forman, Gazengel, Belaisch-Allart, Hayout, Raingorn & Frydman, *Factors Influencing the Success Rate of Human Embryo Freezing in an In Vitro Fertilization and Embryo Transfer Program,* 48 FERTILITY & STERILITY 107–12 (1987) [hereinafter Testart]; Trounson, *Preservation of Human Eggs and Embryos,* 46 FERTILITY & STERILITY 1 (1986); Trounson & Mohr, *Human Pregnancy Following Cryopreservation, Thawing and Transfer of an Eight-cell Embryo,* 305 NATURE 707 (1983).

embryos are similar to those using fresh embryos.[73] The process may reduce or eliminate the need for additional surgery each time a cycle of IVF, GIFT, or ZIFT is initiated.[74] In addition, the risk of multiple gestations is reduced if excess embryos are cryopreserved rather than re-implanted.[75] Studies show that more than one cycle is typically pursued by infertile couples; cryopreservation can hold surgeries and associated physical, emotional and financial costs to a minimum by providing eggs for additional cycles without additional surgeries.[76]

The first human pregnancy from a cryopreserved embryo was reported in 1983.[77] Two years later, the first birth occurred.[78] Since that time, freezing embryos has rapidly become standard practice at many infertility centers.[79]

Cryopreservation has certain drawbacks. The legality of pre-procedure consent forms and disposition agreements specifying what is to be done with the frozen embryos should the couple die, divorce, adopt, change their minds, want to change programs, or fail to pay freezing

73. Fugger reported a pregnancy rate average of 13.4% per transfer and 15% per embryo for frozen embryos. Fugger, *Clinical Status of Human Embryo Cryopreservation in the United States of America,* 52 FERTILITY & STERILITY 986, 988 (1989). Rates for fresh embryo transfer vary depending on the clinic but the average success rate with IVF is 16%. Medical Research Int'l, *supra* note 65 at 19.

74. Testart, *supra* note 72, at 107–12.

75. OTA REPORT, *supra* note 61, at 128, 298.

76. *Id.* at 298; Trounson & Mohr, *supra* note 72, at 709. Additional perceived benefits include allowing preservation of embryos for couples who risk loss of ovarian function because of illness and allowing genetic diagnosis of potential defects prior to reimplantation. *See* Trounson, *supra* note 72, at 9–10.

77. Trounson & Mohr, *supra* note 72. The first successful cryopreservation was performed with rabbit embryos in 1947. Chang, *Normal Development of Fertilized Rabbit Ova Stored at Low Temperature for Several Days,* 159 NATURE 602 (1947).

78. Fugger, *supra* note 73, at 986 (citing Mohr, Trounson & Freeman, *Deep-freezing and Transfer of Human Embryos,* 2 J. IN VITRO FERTILIZATION 1 (1985)).

79. In a survey conducted in early 1987, Bonnicksen and Blank determined that 41% of eighty-eight responding IVF programs used cryopreservation; other respondents planned to begin using it within two years. Bonnicksen & Blank, *The Government and In Vitro Fertilization (IVF): Views of IVF Directors,* 49 FERTILITY & STERILITY 396–98 (1988). Between 1985 and 1986, the number of frozen embryos stored in the United States nearly tripled, rising from from 289 to 824. Bonnicksen, *Embryo Freezing: Ethical Issues in the Clinical Setting,* 18 HASTINGS CENTER REP. 26 (1988). By 1988, the number of frozen embryos topped 9,000, with more than 1,000 frozen embryos used to attempt impregnation. Medical Research Int'l, *supra* note 65, at 18. Three years after the first birth from a cryopreserved embryo, the American Fertility Society announced that cryopreservation was now an established therapeutic procedure. Fugger, *supra* note 73, at 986.

fees remains unsettled.[80] In these cases a guardian ad litem may be appointed to represent the "best interests of the embryo."[81]

### *D. Drug Use During Pregnancy*

Recent medical studies have focused on the dangers of drug use during pregnancy. Public sensitivity to drug use has increased as the war on drugs has become a national priority.[82] One focal point of attention has been drug use during pregnancy.[83] Studies documenting the detrimental effects of drug and alcohol use during pregnancy[84] now supplement the growing literature on the dangers of substance abuse.[85] The use of illicit drugs, alcohol and other substances during pregnancy can have a variety of negative effects on developing fetuses, including

80. See Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 108, slip op. 6 (Tenn. Ct. App. Sept. 13, 1990) (court asked to determine the disposition of frozen embryos upon the couple's divorce); York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (court asked to determine whether a couple could force transfer of frozen embryos from one infertility clinic to another); *see also* Jones, *Cryopreservation and Its Problems*, 53 FERTILITY & STERILITY 780 (1990). For a discussion of the *Davis* case, see Robertson, *Resolving Disputes over Frozen Embryos*, 19 HASTINGS CENTER REP. 7 (1989).

81. *See, e.g.*, LA. REV. STAT. ANN. § 131 (West Supp. 1990) ("In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interests of the in vitro fertilized ovum.") It would appear necessary under this standard to appoint several guardians to ensure that the separate juridical entity of each frozen or fresh embryo is represented, because the embryos may have competing interests in being selected for implantation.

82. Doerner, *Flames of Anger, Washington Heats Up Its War Against Drugs South of the Border*, TIME, Jan. 18, 1988, at 28; Duffy, *Fighting The Drug War from the Trenches*, U.S. NEWS & WORLD REP., Sept. 8, 1986, at 20; Duffy, *Drugs: Now Prime Time*, U.S. NEWS & WORLD REP., Aug. 11, 1986, at 16; Taylor, *Uncovering New Truths About the Country's No. 1 Menace*, U.S. NEWS & WORLD REP., July 28, 1986, at 50; *Battle Strategies; Five Fronts in a War of Attrition*, TIME, Sept. 15, 1986, at 69; Lichtblau & Shaw, *Crack: It's Not Just a City Drug*, Los Angeles Times, April 5, 1988, § 1, at 1, col. 1.

83. A recent study of women in Florida reported a 14.8% positive toxicological response in screening for alcohol, marijuana, cocaine, or opiates. Chasnoff, Landress & Barrett, *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED 1202 (1990) [herinafter Chasnoff].

84. *See, e.g.*, E. ABEL, FETAL ALCOHOL SYNDROME AND FETAL ALCOHOL EFFECTS (1984); H. ROSETT & L. WEINER, ALCOHOL AND THE FETUS 6 (1984); Chasnoff, Griffith, MacGregor, Dirkes & Burns, *Temporal Patterns of Cocaine Use in Pregnancy*, 261 J. A.M.A. 1741 (1989) [hereinafter Temporal Patterns]; Chasnoff, *supra* note 83; Chavez, Mulinare & Cordero, *Maternal Cocaine Use During Early Pregnancy as a Risk Factor for Congenital Urogenital Anomalies*, 262 J. A.M.A. 795 (1989) [hereinafter Chavez]; Zuckerman, Frank, Hingson, Amaro, Levenson, Kayne, Parker, Vinci, Aboagye, Fried, Cabral, Timperi & Bauchner, *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762 (1989).

85. Cregler & Mark, *Medical Complications of Cocaine Abuse*, 315 NEW ENG. J. MED. 1495 (1986); Isner, Estes & Thompson, *Acute Cardiac Events Temporally Related to Cocaine Abuse*, 315 NEW ENG. J. MED. 1438 (1986); Jonsson, O'Meara & Young, *Acute Cocaine Poisoning: Importance of Treating Seizures and Acidosis*, 75 AM. J. MED. 1061 (1983).

reduced birth weight,[86] intrauterine growth retardation,[87] abruptio placenta,[88] urinary tract defects,[89] reduced head circumference,[90] and the birth of addicted newborns who suffer from withdrawal.[91] The evidence suggests that these infants may suffer from a lifetime of impairments, particularly when drugs are used during the formatively critical first trimester.[92] Heavy alcohol use has been shown to cause growth retardation, depression of the central nervous system development and facial abnormalities.[93] In addition, cigarette smoking has been associated with increased risk of premature delivery and low birth weight.[94] Some prescription and non-prescription drugs, from aspirin to tetracycline, may also have deleterious effects on the fetus.[95]

## III. STATUS OF THE FETUS AT COMMON LAW

Although courts have recognized limited causes of action involving fetuses, courts have not gone so far as to give fetuses the legal status of persons. Traditionally, a fetus has not had legal rights separate from those of the woman who bears the fetus.[96] Although some courts accorded the fetus limited protectable interests, fetuses have not

86. *Temporal Patterns, supra* note 84, at 1743.

87. *Id.*

88. *Id.*

89. Chavez, *supra* note 84, at 785.

90. *Temporal Patterns, supra* note 84, at 1743.

91. *Id.* at 1744.

92. *Id.* at 1743; Chavez, *supra* note 84, at 795.

93. H. ROSETT & L. WEINER, *supra* note 84, at 6. For a discussion of prenatal hazards, see Nolan, *Protecting Fetuses from Prenatal Hazards: Whose Crimes? What Punishment?,* 9 CRIM. JUST. ETHICS 13, 14–16 (1990). Nolan includes drugs, cigarette smoking, exposure to carbon monoxide and lead, alcohol consumption, genetic conditions, infectious diseases, treatment refusals and inadequate prenatal care among the in utero hazards to which fetuses may be exposed during gestation.

94. Shino, Klebanoff & Rhoads, *Smoking and Drinking During Pregnancy: Their Effects on Preterm Birth,* 255 J. A.M.A. 82, 84 (1986).

95. Tetracycline used during pregnancy can cause discoloration of the enamel on the teeth. *See* Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981). Aspirin may injure the fetus. A. GUTTMACHER, PREGNANCY, BIRTH AND FAMILY PLANNING 78 (1986). DES and thalidomide are examples of prescription drugs later found to be dangerous to the fetus. Recent cases suggest that ingestion of DES during pregnancy may also have caused increased rates of rare cancers in the offspring of children born to women who used DES. *See* Marcotte, *DES Legacy,* 76 A.B.A. J. 14, 14 (1990).

96. Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection,* 95 YALE L.J. 599 (1986) [hereinafter *Women's Rights/ Fetal Rights*]. In Roe v. Wade, the Court stated that "the unborn have never been recognized in the law as persons in the whole sense" and, therefore, the fetus is not to be accorded the status of a person. Roe v. Wade, 410 U.S. 113, 162 (1973). As a result, legal rights will not be conveyed "except in narrowly defined situations and except when the rights are contingent upon live birth." *Id.* at 161.

enjoyed the legal status of personhood. Interests ostensibly accorded to the fetus were frequently a means of protecting the rights of existing persons. For inheritance purposes, a life in being was deemed to exist from the moment of conception.[97] The actual right to inherit, however, was contingent upon live birth.[98] This legal fiction was designed to promote the presumed intentions of the testator and to limit the harsh application of the rule against perpetuities, not to confer legal status upon the fetus.[99]

Likewise, the criminal law has not historically afforded the same protections to the fetus as to existing individuals.[100] At common law, killing a fetus was not murder; indeed, even after viability, causing the death of a fetus was only considered a misdemeanor.[101] Only if the fetus was born alive and subsequently died of injuries sustained in utero could murder be charged.[102] Some states have altered the common law by statute to include unlawful feticide as a murder.[103]

In the civil law context, although courts have gradually begun to reverse the traditional rule against allowing recovery for torts against fetuses, this has not amounted to a recognition of the fetus as a juridical person. As was the case with the criminal law, civil law did not traditionally view a fetus as a person separate from the woman; therefore, it did not contemplate recovery for tortious conduct that injured a fetus.[104] Gradually, however, courts began to recognize causes of action for injuries sustained by a fetus after viability if the fetus was later born alive.[105] Some courts have extended tort liability to injuries sustained by a fetus prior to viability when the tortious conduct is

97. "An infant . . . in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy . . . [i]t may have a guardian assigned to it, and it is enabled to have an estate limited to its use . . . ." 1 W. BLACKSTONE, COMMENTARIES *130.

98. *Id.*

99. *See* Baron, *The Concept of Person in the Law,* in DEFINING HUMAN LIFE: MEDICAL, LEGAL AND ETHICAL IMPLICATIONS 128 (M. Shaw & E. Doudera eds. 1983); *see also* UNIFORM PROBATE CODE § 2–108 (1969); *Women's Rights/Fetal Rights, supra* note 96, at 601.

100. *See* State v. Winthrop, 43 Iowa 519 (1876).

101. Note, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection—But Can They Succeed?,* 20 J. MARSHALL L. REV. 747, 749 (1987).

102. *See* R. PERKINS, CRIMINAL LAW 140 (2d ed. 1969).

103. *See, e.g.,* CAL. PENAL CODE § 187 (West 1988); WASH. REV. CODE § 9A.32.060(b) (1989).

104. *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884) (holding that no cause of action for prenatal injuries existed because the fetus was not an entity separate from the woman).

105. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) (cause of action for fetal injuries sustained post-viability recognized for later live born child); W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984). [hereinafter PROSSER AND KEETON].

committed by a party other than the woman.[106] One court has even allowed recovery by the child for tortious conduct committed by the woman during pregnancy.[107] One state supreme court, however, refused to extend liability to include tortious conduct by the pregnant woman, reasoning that a distinction should be drawn between acts by third parties that harm the fetus and acts by the pregnant woman herself.[108] The Illinois Supreme Court has aptly explained, "No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world."[109] The court reasoned that "the imposition of such an obligation would improperly curtail the privacy and autonomy of the pregnant woman, while the imposition of obligations on a third party furthers the interests of both the woman and the fetus."[110]

As the foregoing discussion illustrates, allowing recovery for tortious conduct that harms the fetus is not tantamount to recognizing and conferring legal status upon the fetus.[111] Suits have been allowed on the basis of the loss suffered by the parents, or the child if it is subsequently born alive, not because the fetus has the legal rights of a juridical person.[112]

## IV. THE RIGHT TO PRIVACY

Matters concerning family rights, including procreation and the decision to have a child, have been viewed as governed by the constitutional rights of privacy and liberty.[113] Thus, governmental actions

106. *See* Note, *Unborn Child: Can You Be Protected?,* 22 U. RICH. L. REV. 285, 286 n.9 (1988) (citing Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive,* 21 SAN DIEGO L. REV. 325, 331–32 (1984)).

107. Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980) (pregnant woman's use of tetracycline during pregnancy caused her child to have discolored teeth).

108. Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

109. 531 N.E.2d at 360.

110. *Id.*

111. *See* Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights,* 10 HARV. WOMEN'S L.J. 9, 40–41 (1987); *Women's Rights/Fetal Rights, supra* note 96, at 600–01.

112. Goldberg, *supra* note 52, at 601; *Women's Rights/Fetal Rights, supra* note 96, at 601–02.

113. Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couple to use contraception). In *Griswold,* Justice Douglas found the right of privacy emanated from penumbras of the Constitution, *id.* at 481–84, while Justice Goldberg's concurrence grounded the privacy right on the "concept of liberty." *Id.* at 486; *see also* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Carey v. Population Servs. Int'l., 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942). The right to privacy is deemed to emanate from the first, fourth, fifth, ninth and fourteenth amendments. *See Roe,* 410 U.S. at 152–53. *But see* Bowers v.

interfering with such decisions are subject to strict scrutiny analysis.[114] The governmental objective must serve a necessary and compelling state interest and the intrusion must be narrow to satisfy constitutional requirements.[115]

A series of cases has provided the framework for understanding the privacy right. In *Skinner v. Oklahoma,*[116] the Supreme Court struck down a statute providing for the sterilization of persons involved in two or more "felonies involving moral turpitude,"[117] declaring that the right to reproduce was "one of the basic civil rights of man."[118] In *Griswold v. Connecticut,*[119] the Supreme Court held that the right of married couples to use contraceptives falls within "the zone of privacy created by several fundamental constitutional guarantees."[120] The right to use contraceptives was extended to unmarried individuals in *Eisenstadt v. Baird,*[121] in which Justice Douglas wrote if "the right of

Hardwick, 478 U.S. 186 (1986). In *Bowers,* the Supreme Court refused to find constitutional protection for homosexual activity. *Id.* Precedent covering prior privacy decisions was "dismissed in two brisk paragraphs as having no relevance to this issue, because those cases involved rights related to 'family, marriage or procreation.'" L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1422 (2d ed. 1988) (citing *Bowers,* 478 U.S. at 191). "The dissenters in *Bowers* described the relevant privacy interests as those relating to 'certain *decisions* that are properly for the individual to make.'" L. TRIBE, *supra* at 1425 n.34 (citing *Bowers,* 478 U.S. at 204 (dissenting opinion)) (emphasis in original). Tribe notes that the right to privacy "is something of a misnomer: what is truly implicated in the decision whether to abort or to give birth is not privacy, but autonomy." *Id.* at 1352. In *Cruzan v. Director, Mo. Dep't of Health,* 110 S. Ct. 2841 (1990), the Supreme Court upheld a Missouri statute requiring clear and convincing proof of an incompetent's wishes in order to allow removal of artificial nutrition and hydration from a person in a persistent vegetative state. *Id.* at 2851–54. While the majority assumed a liberty interest in an individual's right to refuse treatment, the state's interests in preserving life had to be balanced against the rights of the individual. *Id.* at 2852. Placing the risk of error on those seeking to terminate treatment was deemed an acceptable legislative choice. *See id.* at 2854. The dissent, however, viewed the Missouri statute as impermissably infringing on the incompetent's fundamental right to refuse medical treatment. *Id.* at 2867–70 (Brennan, J., dissenting). While the right of privacy of a competent adult to refuse treatment was presumed by the majority, the high standard of proof required to enforce the right of an incompetent individual to refuse treatment seems to limit the privacy rights of incompetents by balancing them against state interests. It remains to be seen whether the *Cruzan* decision heralds a contraction of fundamental rights and a corresponding increase in state interests.

114. *See Roe,* 410 U.S. at 155.

115. *Griswold,* 381 U.S. at 485–86.

116. 316 U.S. 535 (1942).

117. *Id.* at 541.

118. *Id.* Tribe notes that the Court was in part motivated to establish reproductive autonomy as a fundamental right "because of fear about the invidious and potentially genocidal way in which governmental control over reproductive matters might be exercised if the choice of whether or when to beget a child were transferred from the individual to the state." L. TRIBE, *supra* note 113, at 1339.

119. 381 U.S. 479 (1965).

120. *Id.* at 485.

121. 405 U.S. 438 (1972).

privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[122]

In *Roe v. Wade,*[123] the Supreme Court established that privacy rights protected the decision whether to terminate a pregnancy.[124] *Roe* established a trimester framework for evaluating state interests.[125] Prior to viability, states lack a compelling interest in protecting potential life; therefore, they can only proscribe abortion after viability.[126] Even then, states cannot prohibit abortions which are necessary to protect the life or health of the woman.[127] Health has been broadly defined to include psychological, familial and emotional factors.[128] The doctrine enunciated in *Roe* has not been overturned, although its continuing vitality is presently uncertain because of Justice Souter's addition to the court,[129] and because the decisions following *Roe* have refused to extend the case's reasoning to a variety of abortion statutes.[130]

In *Webster v. Reproductive Health Services,*[131] the plurality rejected the *Roe* trimester framework as inappropriate, stating it made "consti-

122. *Id.* at 453 (emphasis in original).

123. 410 U.S. 113 (1973).

124. *Id.* at 153.

125. *Id.* at 163–64. The State's interest in protecting maternal health justified regulating the abortion procedure during the second trimester, but there was no compelling State interest justifying intervention during the first trimester. *Id.* at 149, 163–64. In the third trimester, the state can regulate in the interests of maternal health and potential viability of the fetus.

126. *Id.* at 163–64. For a general discussion of the state's interests, see Rush, *Prenatal Caretaking: Limits of State Intervention With and Without Roe,* 39 U. FLA. L. REV. 55 (1987).

127. No trade-offs between a woman's health and the state's interest in protecting potential life are permissible. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 769 (1986).

128. Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

129. Until Justice Brennan's recent resignation, a plurality attempting to vote in favor of the constitutionality of legislation restricting abortion rights has had to take Justice O'Connor's position into account. While Justice Scalia has repeatedly criticised and called for *Roe* to be reexamined, *see Webster,* 109 S. Ct. at 3064 (Scalia, J., concurring), Justice O'Connor has stated that governmental regulation becomes unacceptable if it "unduly burdens the right to seek an abortion." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting). In Hodgson v. Minnesota, 110 S. Ct. 2926, 2950–51 (1990) (O'Connor, J., concurring), the lack of a judicial bypass procedure was deemed unacceptable by Justice O'Connor, indicating that for the time being the Supreme Court will continue to recognize a fundamental right to abortion. The effect of the newest addition to the Supreme Court remains to be seen.

130. *See, e.g., Webster,* 109 S. Ct. at 3052–58; see also *Hodgson,* 110 S. Ct. at 2930–31.

131. 109 S. Ct. 3040 (1989).

tutional law in this area a virtual procrustean bed."[132] According to the plurality, state interest in protecting potential life exists throughout pregnancy; the arbitrary demarcation of trimesters is therefore inappropriate.[133]

Currently, the constitutional right to privacy includes a conditional freedom to make decisions relating to the termination of a pregnancy. The right to privacy, however, is not limited to the abortion context. The right was first defined in the field of family autonomy,[134] and it has been identified in individual autonomy contexts outside the scope of traditional family relationships.[135] The doctrine remains a viable, albeit less than invincible, means of protecting certain personal decisions from government intervention.[136]

## V. APPOINTMENT OF COUNSEL OR A GUARDIAN AD LITEM TO REPRESENT A FETUS

Typically, cases in which guardians ad litem have been sought or appointed have been of three types: abortion cases, forced medical treatment cases and cases involving allegations of substance abuse during pregnancy.[137] In the earliest cases concerning the appointment of fetal guardians ad litem, intervenors sought to initiate proceedings on behalf of fetuses, challenging a woman's right to obtain an abortion.[138]

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132. *Id.* at 3056. Because Justice O'Connor ultimately found the provisions at issue in *Webster* to be consistent with *Roe,* the *Roe* framework has not yet been altered.

133. *Id.* at 3057.

134. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

135. *See, e.g.,* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972).

136. *See, e.g.,* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

137. It is difficult to ascertain with certainty the number of cases in which a guardian ad litem has been appointed for a fetus. Cases often go unreported, are not appealed, or are settled. In addition, many criminal cases go unreported, are not appealed, or are settled because charges are dropped, dismissed, or otherwise altered. *See* L. Paltrow, H. Fox & E. Goetz, ACLU Memorandum: State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions (April 20, 1990) (on file with the *Washington Law Review*) [hereinafter ACLU Memorandum]; State v. Gethers, No. 89–4454 CF10A (Fla. Cir. Ct. November 6, 1989), *summarized in* ACLU Memorandum, *supra,* at 4 (charges against woman who allegedly took drugs during pregnancy dismissed; court held fetus was not a person for purposes of the child abuse statute); Michigan v. Cox, No. 9053545FH (Mich. Cir. Ct. filed January 30, 1990), *summarized in* ACLU Memorandum, *supra,* at 7 (charges of child abuse and delivery of drugs during pregnancy dropped but charge alleging delivery of drugs after birth but prior to cutting of umbilical cord retained); *see also In re* A.C., 533 A.2d 611 (D.C. 1987), *vacated,* 573 A.2d 1235 (1990) (guardian ad litem sought to force terminally ill woman to submit to a cesarian section).

138. *See* Brief of Amici Curiae Minors and Abortion Providers in Support of Respondent T.W. at 6–7, Boylston v. T.W., 109 S. Ct. 2095 (No. A-903) (1989) (on file with the *Washington*

Courts have denied such motions, primarily because the intervenor seeking to become a guardian ad litem lacked standing.[139] The guardian ad litem lacked standing because standing is derived from the status of the represented party, and the fetus is not a person for fourteenth amendment purposes.[140]

In a second group of cases, courts have appointed guardians ad litem to implement court-ordered medical treatment beneficial to the fetus or woman over the objections of the woman.[141] The development of fetal therapies has raised the question whether these therapies should be mandated when the woman objects to them. Technological advancements in assessing the medical needs of the fetus have already given rise to court-ordered cesarians.[142] Although lower courts often grant court orders to perform cesarians over the objections of pregnant women,[143] the only two appellate court decisions addressing the matter reach opposite conclusions.[144] As a result of advances in prenatal imaging, diagnosis and therapy, physicians may have to decide whether the fetus is a separate patient. "When medical problems arise, the physician must decide who the patient is, what treatment, if any, should be implemented, and what the ramifications of such treatment will be on the 'other' patient."[145]

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*Law Review*) [hereinafter T.W. Brief]. As examples, the T.W. Brief cites Woe v. Bear, No. H-79-1866 (S.D. Tex. May 5, 1980); Roe v. Casey, No. 78-2214 (E.D. Pa. Dec. ll, 1978); Margaret S. v. Edwards, No. 78-2765 (E.D. La. Oct. 2, 1978) (order denying motion to intervene); Akron Center for Reproductive Health v. City of Akron, No. 178-155A (N.D. Ohio May 16, 1978) (order denying motion to intervene in relevant part) (subsequent history on merits omitted); Zbaraz v. Quern, No. 77-C-4522 (N.D. Ill. May 15, 1978) (subsequent history on merits omitted). T.W. Brief, *supra*, at 6-7.

139. T.W. Brief, *supra* note 138, at 7 n.9 (identifying Ryan v. Klein, 412 U.S. 924 (1973), *vacated*, Nassau County Medical Center v. Klein, 412 U.S. 925, as an example).

140. T.W. Brief, *supra* note 138, at 6-7.

141. *See infra* notes 146-60 and accompanying text.

142. *See* Gallagher, *supra* note 111, at 9; Goldberg, *supra* note 53, at 609; Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987) [hereinafter Kolder]; Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333 (1982); *Women's Rights/Fetal Rights*, *supra* note 96, at 599.

143. *See, e.g., In re* Madyun Fetus, 114 Daily Wash. L. Rep. 2233, col. 3 (D.C. Super. Ct. 1986). Many of the cases are unreported, but have been described in medical and legal literature. *See, e.g.*, 58 OBSTETRICS & GYNECOLOGY 209 (1981).

144. *See In re* A.C., 533 A.2d 611 (D.C. 1987), *vacated*, 573 A.2d 1235 (1990) (while the trial court ordered the cesarian and the first appellate court decision upheld the order, a rehearing en banc led to a reversal); Jefferson v. Griffin Spalding County Hosp. Ass'n, 247 Ga. 86, 274 S.E.2d 457 (1981) (ordering the woman to submit to a cesarian if she appeared at the hospital). For a discussion of *In re A.C.*, see Goldberg, *supra* note 53, at 614-18. As of this time, no court has been asked to compel a woman to submit to prenatal testing or therapy. If obligations to the fetus become legally enforceable, however, such orders could become commonplace.

145. Goldberg, *supra* note 53, at 591. For a discussion of the problem of defining maternal-fetal issues in terms of "other"-ness, see Note, *Rethinking (M)otherhood: Feminist Theory and*

Courts have routinely appointed representatives[146] in compelled medical treatment cases, with little discussion of the rationale behind such appointments. In *Raleigh Fitken-Paul Memorial Hospital v. Anderson,*[147] the court appointed a "special guardian" for an "infant" when a pregnant woman refused blood transfusions deemed necessary to save her and her fetus.[148] In *Jefferson v. Griffin Spalding County Hospital,*[149] the court granted a motion by the Department of Human Resources for temporary custody of the fetus, and ordered the woman to submit to a cesarian section. The court based its appointment of counsel for the fetus at least in part on the premise that "this child is a viable human being and entitled to the protection of the Juvenile Court Code of Georgia."[150] A similar approach was taken by a trial court in Massachusetts in *Taft v. Taft,*[151] where a husband sought to compel his wife to have a cerclage in order to prevent a miscarriage.[152] The trial court judge appointed a guardian ad litem to represent "the unborn child."[153] The guardian agreed with the husband's stance that the cerclage should be performed.[154] The Supreme Judicial Court of Massachusetts rejected the contention that in this case the state had interests compelling enough to "justify curtailing the wife's constitutional rights."[155] The court did not, however, explicitly rule out the appointment of guardians in future cases under different facts.

A New York court dispensed with "the usual formalities of the assignment of counsel [because of] the danger of imminent death," and ordered a transfusion for a woman who was eighteen weeks preg-

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*State Regulation of Pregnancy,* 103 HARV. L. REV. 1325, 1326 (1990) (arguing that by characterizing the issue as one of competing rights, "the current debate has obscured the range of conditions contributing to the problem, such as the lack of available prenatal care and treatment programs for pregnant addicts"). The Note also argues that the focus should be on the needs of the woman and the fetus, which do not always conflict. *Id.* at 1341–43.

146. The designation given the representative has varied from "guardian ad litem" to "special guardian" or "special counsel." Cox v. Court of Common Pleas, 537 N.E.2d 721 (Ohio App. 1988) (guardian ad litem); *In re* A.C., 533 A.2d 611 (D.C. 1987), *vacated,* 573 A.2d 1235 (1990) (counsel).

147. 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964).

148. The court reasoned that the "unborn child is entitled to the law's protection." *Id.* at 538. Notably, however, the case was decided prior to Roe v. Wade, 410 U.S. 113 (1973), which established a woman's right to privacy in matters concerning abortion and childbearing.

149. 247 Ga. 86, 274 S.E.2d 457 (1981).

150. *Id.* at 459.

151. 388 Mass. 331, 446 N.E.2d 395 (1983).

152. A cerclage consists of suturing the cervix to prevent spontaneous miscarriage.

153. *Taft,* 446 N.E.2d at 395.

154. *Id.* at 396.

155. *Id.* at 397.

nant.[156] The judge appointed a physician as special guardian for the fetus and empowered him to use his medical judgment to act on behalf of the fetus, including the power to order the woman to submit to a blood transfusion.[157]

In the case of *In re Madyun,*[158] a guardian ad litem was appointed to represent a full term fetus in an action to compel a woman in labor to have a cesarian section because she refused to have the surgery. The court also appointed counsel to represent the fetus in the widely publicized case of *In re A.C.,*[159] where a cesarian section was ordered despite the fact that the woman objected to the surgery.[160]

A number of cases concerning drug abuse by pregnant women also raise the issue of the appointment of a representative for the fetus. Most of the cases involved interpretation of whether, for the purposes of the state's child welfare or child abuse act, the fetus was equivalent to a child. If so, the court would have jurisdiction to appoint a guardian ad litem pursuant to the requirements of the statute. If not, the court would lack jurisdiction and could not appoint a guardian.

Courts have split in their resolution of this issue. In *In re Smith,*[161] the court determined that an unborn child is a "person" entitled to

156. *In re* Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898, 899 (Sup. Ct. 1985). Exigencies of time frequently result in an abrogation of the pregnant woman's rights. In one case, a hospital petitioned for emergency protective services to compel the transfer of a pregnant woman in premature labor based on "a fiduciary capacity for the unborn fetus." Petition For Emergency Protective Services at 2, *In re* Walters & Unborn Fetus, No. 52658 (Md. Cir. Ct. Jan. 12, 1990). The woman was in premature labor and did not want to be transferred to a hospital some distance from her home and small son. No counsel was appointed for the woman until *after* the court granted the petition and the hospital transferred Ms. Walters to the second facility. The court granted the petition despite the fact that it found Walters to be a competent adult, because in its view, "balancing the consent rights of Tawanda Walters with the medical care needs of her unborn fetus compel this decision." Order Granting Emergency Protective Services at 2, *In re* Walters & Unborn Fetus, No. 52658 (Md. Cir. Ct. Jan. 12, 1990). The court used a compelling state interest test, finding that the "emergency protective services are the least restrictive alternatives available under the circumstances and do not cause physical harm to Tawanda Walters." *Id.*

157. *In re* Jamaica Hosp., 491 N.Y.S.2d at 900.

158. 114 Daily Wash. L. Rep. 2233, col. 3 (D.C. Super. Ct. 1986).

159. 533 A.2d 611 (D.C. 1987), *vacated,* 573 A.2d 1235 (1990).

160. Barbara Mishkin, counsel for the fetus, did not view herself as a guardian ad litem, but rather as an "attorney to represent the interests of the fetus," and to implement A.C.'s previously expressed wishes. Conversation with Barbara Mishkin (June 12, 1990). However, the opinion indicates that she had argued that the state had the responsibility to perform a cesarian in order to protect the life of the fetus even if A.C. did not wish to have a cesarian performed. *In re* A.C., 573 A.2d at 1238.

161. 128 Misc. 2d 976, 492 N.Y.S.2d 331, 334–35 (Fam. Ct. 1985), *appeal granted, In re* Sebastian M., 559 N.Y.S.2d 813 (1990). *But see In re* Fletcher, 141 Misc. 2d 333, 533 N.Y.S.2d 241 (Fam. Ct. 1988) (finding prenatal substance abuse could not be the basis for finding of child abuse or neglect), *appeal granted, In re* Sebastian M., 559 N.Y.S.2d 813 (1990).

protection under the state's family court act. Although the question whether to appoint a fetal guardian ad litem did not arise because the child had already been born, the court's rationale would have given it jurisdiction to make such an appointment for a fetus.[162] A similar situation arose in *In re Ruiz.*[163] The child abuse statute in Ohio defines a child as "a person who is under the age of eighteen years."[164] The court broadly construed the definition to include a viable unborn fetus.[165] Consequently, had the case come before the court while the pregnancy was ongoing, the court could have appointed a guardian ad litem for the fetus.

The case of *Harnum v. Harnum*[166] presents the issue in a slightly different context. As part of a divorce and custody action, an ex parte motion was submitted on behalf of an "unborn child" to compel a pregnant woman to enter a detoxification program.[167] The court appointed a guardian ad litem to represent the interests of an existing child and "to the extent possible the interests of the yet unborn child."[168]

A New Jersey case, in dicta, suggests that a guardian ad litem may be appointed in cases involving a viable fetus.[169] However, in *In re D.K.,* the court held that prior to viability, the appointment of a guardian ad litem for the fetus is improper.[170] The woman in that case was only eight to ten weeks pregnant when the guardian was appointed. According to the court, the appointment of a guardian in the first trimester was inappropriate because it would "permit a third party to control the fetus, contrary to *Roe v. Wade.*"[171] In addition, the court noted that the New Jersey Rules provide for appointment of a guardian ad litem for a "minor," and, in the court's view, a fetus did not qualify.[172]

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162. *In re* Smith, 482 N.Y.S. 2d at 335. Because the child was held to fall within the act's jurisdictional definition of a "person," a guardian ad litem could have been appointed under the act.

163. 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (C.P. 1986). *But c.f.* Cox v. Court of Common Pleas, 42 Ohio App. 3d 171, 537 N.E.2d 721 (1988).

164. *In re Ruiz,* 500 N.E.2d at 936.

165. *Id.* at 938.

166. No. 90-M-207 (N.H. Super. Ct. May 18, 1990) (on file with the *Washington Law Review*).

167. *Id.*

168. *Id.*

169. *In re* D.K., 204 N.J. Super. 205, 497 A.2d 1298 (1985).

170. *Id.* at 1302.

171. *Id.*

172. *Id.*

The case of *In re Dittrick Infant*[173] raised the issue of whether child abuse and neglect provisions should apply to a fetus. The probate court issued an order giving the Department of Social Services temporary custody over the "child" forty-five days prior to birth.[174] The Court of Appeals found that the probate court lacked jurisdiction over the unborn child and, therefore, the appointment of the guardian was improper.[175]

California courts reached the same conclusion in *Reyes v. Superior Court*[176] and *In re Steven S.*[177] In *In re Steven S.*, the juvenile court ordered that a fetus be "detained" pursuant to court rules until the adjudication of a dependent child petition.[178] The juvenile court found that California dependency provisions extended to cover the fetus. On appeal, the court found that the legislature did not intend the term "person" to include an unborn fetus; therefore, the juvenile court lacked jurisdiction to hear the initial dependent child petition.[179]

An Ohio juvenile court appointed a guardian ad litem for a fetus in a dependency and neglect action.[180] Although the court said that the issue of whether the fetus was a person under the statute was *not* before it, the court found that the juvenile court lacked jurisdiction over the pregnant woman, and could not compel her to take action for the benefit of the fetus.[181]

In sum, courts have been inconsistent when addressing the issue of appointing guardians ad litem for fetuses. Efforts by intervenors to have fetal guardians ad litem appointed in abortion cases have failed because the courts have held the fetus is not a person. In forced medical treatment cases, some courts have appointed guardians ad litem without adequately considering the propriety of the appointment. In prosecutions of drug-abusing pregnant women under state criminal

173. 80 Mich. App. 219, 263 N.W.2d 37 (1977).

174. *Id.* at 38.

175. *Id.* at 39.

176. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

177. 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981).

178. *Id.* at 526.

179. *Id.* at 528.

180. Cox v. Court of Common Pleas, 42 Ohio App. 3d 171, 537 N.E.2d 721 (1988).

181. Other state courts have agreed that their child neglect statutes did not apply to fetuses. *See* ACLU Memorandum, *supra* note 137, at 4 (citing Florida v. Gethers, No. 89–4454 CF 10A (Fla. Cir. Ct. November 6, 1989)); *see also* State v. Osmus, 73 Wyo. 183, 276 P.2d 469 (1954). *But see* ACLU Memorandum, *supra* note 137, at 11 (citing State v. Pfannensteel, No. 1–90–8 CR (Laramie County Ct., Wyo. filed January 5, 1990)). If the pregnant woman was herself a juvenile, the court would have jurisdiction over her person, and could order her to act in ways which would have a secondary beneficial effect on the fetus; but the authority of the court would be to protect the interests of the juvenile and not the fetus. *See Cox*, 537 N.E.2d at 725.

and child abuse provisions, guardians ad litem have recently been appointed to represent the defendant's fetus. In some jurisdictions, the courts have actually explicitly addressed the propriety of such an appointment. Whether the guardian ad litem was appointed hinged on whether the court viewed the fetus as a person under state law.

## VI. THE IMPROPRIETY OF APPOINTING FETAL GUARDIANS AD LITEM UNDER CURRENT LAW

The right to privacy and autonomy in medical decisionmaking is not absolute; however, to intervene the state must show not only a compelling interest, but must also narrowly tailor the means used to protect that interest.[182] In examining the asserted state interest in the context of abortion regulations, the Supreme Court recently declined to adopt a general test, choosing instead to decide on a narrow basis whether a particular state statute is properly tailored to meet the asserted state interest.[183] In the context of forced medical treatment and the application of child abuse and neglect provisions against pregnant women, it is virtually impossible for the state to meet these requirements. While "promoting healthy pregnancies and healthy babies"[184] is a laudable goal, pursuing this goal through the use of guardians ad litem imposes unacceptably intrusive regulations on the conduct of pregnant women.[185] Improving neonatal health is impor-

182. *See supra* notes 113–36 and accompanying text. In the most recent abortion cases, the court appeared to apply this level of protection only upon a finding that the regulation unduly burdened the procreative autonomy rights. If the regulation chilled the exercise of autonomy rights, it would receive heightened scrutiny. *See, e.g.*, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990).

183., Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989). For a general discussion of instances where the court refused to find a state's interest compelling, see Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster,* 138 U. PA. L. REV. 179, 205–07 (1989).

184. Johnsen, *supra* note 183, at 205.

185. The appointment of a guardian ad litem may create an adversarial climate when, in the vast majority of cases, pregnant women make decisions that are in their own and their fetus's best interest. *See* Pollitt, *'Fetal Rights': A New Assault on Feminism,* THE NATION, March 26, 1990, at 409. Pollitt attributes the increasingly acceptable view that fetuses need protection from the women who bear them to the following factors: societal frustration at our inability to control the drug crisis, an unwillingness to devote the necessary resources to the crisis, technological advances and the anti-choice movement. "In its various aspects 'fetal rights' attacks virtually all the gains of the women's movement. Forced medical treatment attacks women's increased control over pregnancy and delivery by putting doctors back in the driver's seat, with judges to back them up." *Id.* at 416. According to Pollitt, the interest in fetal rights is in part a politically motivated attempt to appear to be addressing the problem while in fact leaving many of the difficult issues unresolved. *Id.* at 410–14.

Cases in which women do act contrary to what they perceive to be the best interests of their fetuses are not amenable to judicial intervention. Identifying these cases is difficult, if not

tant, but it does not justify governmental attempts to control pregnant women which surpass in scope and duration regulations affecting persons other than pregnant women.[186]

Despite important state objectives, appointing guardians ad litem for fetuses and embryos fails to meet strict scrutiny standards because it is virtually impossible for states to tailor their regulations narrowly enough to satisfy constitutional requirements. First, in order to protect a fetus the state would have to preclude pregnant women from acting as autonomous adults for the duration of their pregnancies.[187] Second, even apart from women's privacy rights, imposing regulations to reduce some risks might create greater hazards.[188] As one author has stated, "The important goal of promoting healthy pregnancies and healthy babies is far better served by recognizing the commonalities of interest between pregnant women and the government in accomplishing this goal, rather than by artificially creating legal conflicts between the pregnant women and the fetuses they carry."[189]

### *A. Medical Treatment Cases*

In forced medical treatment cases, it is inappropriate to balance the rights of a competent, objecting woman with the perceived "interests"

impossible, and ascertaining motivation is neither feasible nor productive. Judicial intervention is likely to force women underground, either causing some of them to seek abortions they would not otherwise have had, or to avoid medical care. *See* Field, *Controlling the Woman to Protect the Fetus,* 17 LAW, MED. & HEALTH CARE 114, 121 (1989); Mariner, *supra* note 18, at 37.

186. Johnsen, *supra* note 183, at 205–06 (citing City of Richmond v. J.A. Crosen Co., 448 U.S. 469 (1989)).

187. Regulations could affect women who are not even pregnant, because some conduct, such as exposure to lead and other environmental hazards, could be detrimental to a later-conceived fetus. *See* Mariner, *supra* note 18, at 40 n.37. In addition, allegations that a pregnant woman's use of DES later resulted in injury to a granddaughter were raised in Enright v. Eli Lilly & Co., No. 58933 (N.Y. Sup. Ct. Mar. 22, 1990), *summarized in* 58 U.S.L.W. 2584 (April 10, 1990).

188. *See* Mariner, *supra* note 18, at 40 n.37. Mariner et al. note the paucity of drug treatment programs for pregnant women. They fear that regulating the conduct of pregnant women will deter women from seeking prenatal care, which is a cause of developmental problems in fetuses. *Id.* at 36–37; *see also Missing Links: Coordinating Federal Drug Policy for Women, Infants and Children: Hearing Before the Senate Comm. on Governmental Affairs,* 101st Cong., 1st Sess. 1 (1989) [hereinafter *Senate Hearing*] (opening statement of Sen. Herbert Kohl); Paltrow, *When Becoming Pregnant is a Crime,* 9 CRIM. JUST. ETHICS 41, 44 (1990).

189. Johnsen, *supra* note 183, at 207.

of a fetus.[190] Under *Roe v. Wade,*[191] the fetus is not a person; therefore, prior to viability, its interests cannot outweigh those of the woman. Although *Webster v. Reproductive Health Services*[192] indicates that a state's compelling interest in protecting human life may arise before viability, the state's interest in limiting abortions may not threaten a woman's life or health. By analogy, states likewise should not be granted the power, before viability, to impair the autonomy of pregnant women. Appointing guardians ad litem prior to viability is inconsistent with privacy and liberty doctrines, and appointing such guardians after viability is ineffective and inconsistent with principles of bodily autonomy and self-determination. Much of the maternal conduct that may be injurious to a developing fetus occurs during the first trimester, when a woman may not even be aware that she is pregnant.[193]

*Webster* involved state regulation of the availability of abortion, not the imposition by the state of an obligation to take affirmative action on behalf of the fetus.[194] Affirmative obligations that involve bodily intrusions of the parent are currently not imposed on parents to benefit existing children; it is therefore inappropriate to impose such obligations on behalf of a fetus.[195] Even assuming arguendo that a fetus is a person, the appointment of a guardian ad litem is inappropriate in compelled medical treatment cases. No court would mandate the appointment of a guardian ad litem for a child in need of an organ

190. Some commentators have called for the appointment of guardians ad litem for the fetus to assist in a judicial determination of whether "the benefit to the fetus from the intervention outweighs the harm to the woman of the coerced intrusion." *See* Robertson, *Legal Issues in Fetal Therapy,* 9 SEMINARS PERINATOLOGY 136, 141 (1985) [hereinafter *Legal Issues*]. Robertson would not, however, undertake this type of balancing when an embryo was involved; nor would he call for the appointment of a guardian ad litem in those cases, because he does not believe the embryo has protectable rights. *See* Robertson, *The Legal Status of Early Embryos (Reproductive Technology and Reproductive Rights),* 76 VA. L. REV. 435 (1990). One Note advocates a guardian ad litem be appointed "to represent to a court the best course of conduct for protecting the fetus." Note, *Maternal Substance Abuse: The Need To Provide Legal Protection for the Fetus,* 60 S. CAL. L. REV. 1209, 1230 (1987).

191. 410 U.S. 113 (1973).

192. 109 S. Ct. 3040 (1989).

193. S. ELIAS & G. ANNAS, *supra* note 38, at 204–09; Field, *supra* note 185, at 119 n.47. If liability were imposed for exposure to risks early in the pregnancy, the potential for the appointment of a guardian ad litem to monitor possible pregnancies becomes much more likely.

194. Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

195. Pollitt notes that fetal right advocates grant rights to the fetus that an existing child cannot claim: "the right, for example, to a safe, healthy place to live." Pollitt, *supra* note 185, at 414.

donation from a parent, nor would the court ever require such a donation.[196]

Appointing guardians for fetuses or embryos creates the following paradox: a woman may legally choose to have an abortion, yet if she chooses to carry the child to term a guardian may be appointed to represent the unborn child's interests against hers. Professor John Robertson posits that when a woman "decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus."[197] Contrary to Robertson's beliefs, such duties are properly viewed as moral obligations, but cannot create legal obligations without incurring unacceptable costs to the civil liberties of women. Although society may view the woman as having moral obligations to the developing fetus, this should not automatically translate into the imposition of legal obligations.[198] The Supreme Court has held that a husband may not veto an

196. *See, e.g.,* McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978) (cousin could not be compelled to undergo bone marrow transplant testing despite being the only compatible donor).

197. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth,* 69 VA. L. REV. 405, 437 (1983) [hereinafter *Procreative Liberty*]. Robertson views the imposition of these obligations as an appropriate use of the law, although he does not favor criminal penalties and incarceration of pregnant women. *See, e.g., id.*; *Legal Issues,* supra note 190, at 141; Robertson, *The Right to Procreate and In Utero Fetal Therapy,* 3 J. LEGAL MED. 333, 357–59 (1982). Robertson does not believe these obligations extend to embryos not yet implanted, nor does he believe any obligations foreclose the woman's right to an abortion.

198. Rhoden, *The Judge in the Delivery Room: The Emergence of Court Ordered Cesareans,* 74 CAL. L. REV. 1951, 1980–81 (1986):

> [I]n this very private and bodily sphere, the issue of moral obligations, even very compelling ones, must be kept distinct from the issue of legal coercion of individuals to meet their moral obligations. The law of rescue condones many omissions that are morally reprehensible. For that matter, refusal to undertake risky rescues does not normally even invoke moral opprobrium. Morally, we seem to have a different standard for pregnant women. But this moral standard does not justify an unparalleled level of legal constraint.

Pollitt challenges Robertson's notion that by affirmatively deciding to keep pregnancies women incur legal duties. For some individuals, true choice is not available—they are addicted, poor, or lack access to abortions. In addition, according to Pollitt, even choosing to become and remain pregnant should not result in a forfeiture of rights.

> Why should pregnant women be barred from considering their own interests? It is, after all, what parents do all the time. The model of women's relation to the fetus proposed by the duty of care ethicists is an abstraction that ignores the realities of life even when they affect the fetus itself. In real life, for instance, to quit one's dangerous job means to lose one's health insurance, thus exposing the fetus to another set of risks.

Pollitt, *supra* note 185, at 415. Nolan discusses moral obligations to avoid prenatal harm, and the intersection of legal and moral obligations:

> While some might argue that a woman has no legal obligation to change any of her behaviors simply because she has become pregnant, it is less clear that this argument would extend to the level of morality. A woman's claim to act as she chooses (based on the principle of autonomy) appears to be legitimately constrained (morally) by her relation to a fetus in an ongoing pregnancy, although it is important to note that this constraint is based on her

abortion.[199] The courts have rejected appeals by intervenors on behalf of fetuses in the abortion context on the ground that fetuses are not persons under the fourteenth amendment.[200] That reasoning precludes the appointment of guardians ad litem for fetuses.[201] Although previous attempts to represent the fetus in abortion cases have failed, broadening fetal rights by appointing fetal guardians in other contexts will renew these attempts, result in unduly burdening those private decisions, and have a chilling effect on a woman's right to have an abortion.

Under *Roe v. Wade,* it is inappropriate to appoint fetal guardians ad litem in cases concerning statutes that restrict minors' access to abortion services but that provide a judicial bypass around the restrictions. The fetus does not have interests to be considered in determining whether abortion should be available to a minor without parental consent.[202] Appointing a guardian ad litem would also seriously infringe a woman's privacy rights. Furthermore, it would congest court dockets with cases not properly amenable to judicial resolution.[203]

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freely choosing to be in relationship to a dependent other. If women are unable to choose not to conceive or not to remain pregnant, then the involuntary nature of their relationship changes its moral character.

Nolan, *supra* note 93, at 18. The existence of moral obligations to the fetus does not necessarily mandate the imposition of legal obligations. *Id.* at 20–21. For a discussion of the intersection of morality, rights and law, see, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 232–78 (rev. ed. 1978); Dworkin, *The Forum of Principle,* 56 N.Y.U. L. REV. 469 (1981). A number of scholars have posited that men and women engage in different processes of moral reasoning that result in different outcomes. *See* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 18–23 (1982) (context and relationships form the core of a woman's moral reasoning, which leads to a moral view emphasizing responsibilities rather than rights and autonomy).

199. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976).

200. "The law is clear that an unborn child is not a person under the Fourteenth Amendment of the United States Constitution and therefore the unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." Poole v. Endsley, 371 F. Supp. 1379, 1382–83 (N.D. Fla. 1974), *aff'd mem. in part,* 516 F.2d 898 (5th Cir. 1975); *see also* Roe v. Wade, 410 U.S. 113, 158 (1973). Therefore, no protection is available to the fetus on § 1983 grounds. Ruiz Romero v. Gonzales Caraballo, 681 F. Supp. 123 (D.P.R. 1988), Harman v. Daniels, 525 F. Supp. 798 (W.D. Va. 1981); *Poole,* 371 F. Supp. at 1382–83. Section 1983 provides for suits when individuals acting under color of state law deprive persons of rights protected by the Constitution and federal laws. 42 USC § 1983.

201. Appointing a guardian ad litem for the fetus would amount to recognizing juridical status for the fetus, which courts have generally declined to do in this context.

202. T.W. Brief, *supra* note 138, at 2.

203. The courtroom is a poor place to debate such intensely private and highly individualized issues as the proper approach to prenatal care and the decision whether or not to terminate a pregnancy.

As the privacy and liberty doctrines encompass more than just abortion rights,[204] the further undermining, even the overruling, of *Roe* would not legitimate the appointment of fetal guardians ad litem; the practice would still violate privacy principles. The privacy doctrine is grounded in the premise that bodily integrity and personal decisionmaking should be protected from intrusive state action.[205] Appointing a guardian ad litem who could call into question the decisions made by a woman during pregnancy would violate the most basic premises of the privacy doctrine.

### *B. The Child Abuse and Neglect Cases*

As currently written, most child abuse and neglect acts do not provide a basis for protecting fetuses and embryos through the vehicle of the guardian ad litem. The statutory language generally indicates that such legislation was not intended to protect fetuses or embryos. The statutes usually contain definitional language that identifies children as persons under a specified age, usually eighteen years old.[206] Under

204. *See supra* notes 113, 134–36 and accompanying text.

205. *See supra* notes 113–136 and accompanying text.

206. Several state legislatures have recently sought to bring fetuses (and potentially embryos) into the scope of their child abuse acts by amending them to include prenatal exposure to drugs within the definition of neglect. In Colorado, the state senate considered and reported without recommendation a bill that would include substance abuse during pregnancy within the definition of child abuse. *See* The Alan Guttmacher Institute, *State Reproductive Health Monitor: Legislative Proposals and Actions* 79 (Issue III, Sept. 1990). In Montana, the state senate introduced a bill that would call for the public health division to appoint a guardian ad litem where a pregnant woman is reported to be chemically dependant and refuses to accept or is unamenable to treatment. *Id.* at 83. In Minnesota, the senate introduced and reported favorably upon a bill that specifies that exposing an unborn to nonmedically used controlled substances is child neglect. *Id.* at 82. In Maryland, the senate passed a bill altering the definition of the word "neglect" in its child neglect statute to include the use of controlled substances by a pregnant woman resulting in prenatal fetal exposure. *Id.* In Georgia, the state house judiciary committee introduced a bill making it a crime to "distribute" controlled substances to a fetus. *Id.* at 80. In addition, some state legislators have sought to expand criminal statutes to proscribe prenatal substance abuse. Legislation before the Illinois legislature entitled "Conduct Injurious to a Newborn" would make it a felony for a woman:

> who knowingly or intentionally uses a dangerous drug or narcotic drug and at the conclusion of her pregnancy delivers a newborn child, and such child shows signs of narcotic or dangerous drug exposure or addiction, or the presence of a narcotic or dangerous drug in the child's blood or urine, commits the offense of conduct injurious to a newborn.

Ill. H. 2835, 86th Gen. Assembly (1989–1990) (amending ch. 38 by adding § 12-4.7). The penalty for conviction of this class four felony ranges from probation to a three-year prison term. Defenses to the charge include lack of knowledge of the pregnancy or entry into a medical treatment program for substance abuse, with a discontinuation of drug use. *Id.*; *see* Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs,* 9 CRIM. JUST. ETHICS 23, 27–28 (1990). All of these revisions address toxicological findings in existing children, and use that as evidence of abuse or neglect to determine whether state intervention should occur. However, it is unclear

current law, the fetus is not a person.[207] Courts are required to give effect to the plain meaning of the statutory language.[208] Given the definitional sections of the statutes and the historical interpretation of the word "child,"[209] it is clear that a fetus is not part of the protected class.

Applying the statutory mechanism to protect fetuses implicates privacy issues not contemplated by the enactors of the child protection statutes. Although a state's interest in protecting children may at times require infringing upon a parent's decisions about child care, it does not rise to the level contemplated by the protection of a fetus or embryo. There is a qualitative difference between the infringement of a mother's autonomy to protect an existing child and restricting the autonomy of a pregnant woman in order to protect a fetus.[210] Existing children are separate entities, and protecting them does not require invading the personal physical autonomy and privacy of another individual. Although the parens patriae powers of the state over living children may sometimes operate to restrict the autonomy of parents,[211] the exercise of these powers does not concomitantly invade their privacy over choices concerning their own persons.

Appointing guardians ad litem for fetuses treats pregnant women as little more than fetal containers,[212] and undermines a woman's posi-

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whether drug use during pregnancy automatically guarantees parental unfitness after birth. *See Developments in the Law—Medical Technology and the Law,* 103 HARV. L. REV. 1519, 1575 & n.124 (1990). Myers argues that existing statutes can be construed to include fetuses because the statutes contain only an upper age limitation. *See* Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?,* 23 DUQ. L. REV. 1, 26 (1984).

207. Roe v. Wade, 410 U.S. 113 (1973).

208. Caminetti v. United States, 242 U.S. 470 (1916).

209. Most state statutes define "child" as "a person under the age of eighteen." *See, e.g.,* 19 COLO. REV. STAT. § 1-103 (1987).

210. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955, 1023 (1984):

> Fetal life is starkly different from all other forms of human life in that the fetus is completely dependent upon the body of the woman who conceived it. It cannot survive without her. Although all human infants, and many adults, are dependent upon others for survival, that support can be provided by many people. The fetus by contrast is dependent upon a particular woman.

Law discusses this dependency in the context of a woman's right to abortion.

211. "Parents engage in a broad range of conduct, from passive neglect to physical abuse, that may, according to some admittedly subjective measure, depart from an ideal family situation. Nevertheless, states have been extremely reluctant to remove children from homes that depart from this subjective ideal . . . ." Note, *supra* note 145, at 1336.

212. *See* Annas, *Pregnant Women as Fetal Containers,* 16 HASTINGS CENTER REP. 13 (1986); Rhoden, *supra* note 198, at 1968. Cases initiated after the birth of a child have used maternal conduct during pregnancy as evidence of unfitness in termination of parental rights cases. However, the issue in those cases is whether the individual is fit to be a parent to an existing child and the inquiries have focused in that direction. *See In re* Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980); *In re* Smith, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (Fam. Ct. 1985).

tion as a competent, independent individual. The appointment of a guardian ad litem would force a woman to justify her conduct to another individual, potentially compelling her to divulge intimate and private details of her life. This information might encompass information about diet, including consumption of caffeine, alcohol, sulfites, fats and sugars; her levels of exercise, weight gain and sexual activity; her work conditions and home environment; her use of seatbelts; her use of plane travel; and other details of ordinary life that could affect fetal development. The guardian would be empowered to argue before the court that a woman's behavior was potentially detrimental to the fetus and should be restricted or prohibited. If the argument was successful, the guardian ad litem would potentially have the power to substitute his or her judgment regarding the propriety of engaging in these activities for the judgment of the woman concerned. A greater intrusion into the protected realms of privacy and bodily autonomy is difficult to imagine.

The Missouri abortion regulation statute which was at issue in *Webster v. Reproductive Health Services*[213] proclaims in its preamble that "[t]he life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being."[214] The statute further declares that Missouri state laws are to be interpreted to afford the same rights to the fetus as to other persons, subject to the Constitution.[215] The *Webster* plurality found the preamble to be acceptable as an expression of the state's value judgment favoring life.[216] The potential ramifications of this state pronouncement are enormous.[217] If the status of personhood begins at conception, a guardian ad litem would have to be appointed in each instance where the conduct of the woman or those around her implicated "fetal rights."[218] The preamble is tempered by the statement that these rights and privileges are subject to constitutional law and Supreme Court precedent.[219] Given that current constitutional law explicitly

213. 109 S. Ct. 3040 (1989).

214. MO. REV. STAT. § 1.205.1(1)–(2) (1986).

215. *Id.* § 1.205.2.

216. *Webster,* 109 S. Ct. at 3050. Because it "does not by its terms regulate abortion or any other aspect of appellees' medical practice," the preamble was viewed as having no substantive effect on a woman's right to have an abortion. *Id.*

217. The preamble may, for instance, affect access to certain forms of contraceptives, application of criminal trespass statutes to anti-abortion protesters, interpretation of under-age drinking regulations, unlawful imprisonment of fetuses and appointment of guardians ad litem. For a general discussion of these possibilities, see Johnsen, *supra* note 183, at 180–86.

218. The appointment of a guardian ad litem would embody the court's view that a fetus is a person, a notion the woman may not share.

219. MO. REV. STAT. § 1.205.2.

holds that the fetus is not a person, it is difficult to know exactly what to make of the preamble.[220] If given force, the preamble would effectively override the rights of pregnant women by conferring the status of legal personhood on the fetus.[221] Although a later section of the preamble[222] attempts to minimize the potential impact on pregnant women by stating that no cause of action for indirect fetal harm from maternal failure to obtain prenatal care should be inferred, the ramifications of this statute typify the dangers inherent in treating fetuses as if they were legally equivalent to persons.[223]

If affirmative obligations are imposed on pregnant women to prevent them from engaging in conduct that might damage a fetus, fetuses would effectively receive greater protection than do existing children. For example, a fetal guardian could be appointed whenever there is a *risk* of harm to the fetus because a woman is using drugs; by contrast, a guardian ad litem is ordinarily appointed in child abuse cases only after a child has suffered actual harm.[224] This distinction is difficult to reconcile with the fact that appointing fetal guardians ad litem results in a much greater imposition on privacy than does the appointment of guardians ad litem for children.

The difficulty of ascertaining the "best interests" of a fetus or embryo will endow a fetal guardian ad litem with the authority to take actions to protect fetuses and embryos based on that guardian's subjective notions of what constitutes appropriate behavior. In the case of children, courts determine the best interests of a separate and presently existing life. The numerous complications inherent in ascertain-

220. Roe v. Wade, 410 U.S. 113 (1973). "The [*Webster*] court did not acknowledge the absurdity of interpreting the expansive language of the declaration—which by its express terms grants fetuses legal personhood under other Missouri laws— to exclude the very abortion restrictions with which it was enacted." Johnsen, *supra* note 183, at 182.

221. Johnsen, *supra* note 183, at 189.

222. "Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." MO. REV. STAT. § 1.205.4.

223. "Although this provision may protect women from being sued by their children for acting 'negligently' during pregnancy, the declaration that life begins at conception nonetheless threatens women with other forms of government interference that is ostensibly aimed at 'protecting' fetuses from the women who bear them." Johnsen, *supra* note 183, at 189–90. It appears from the language of the section that in the future some type of direct harm might be open to prosecution under the statute. The statutory language is silent on the question of whether a woman who acts recklessly or engages in conduct that is grossly negligent may be liable for such actions.

224. "While drug use may expose a fetus to *risk*, harm occurs only in a proportion of cases. The fetus is also at risk from other factors. Child abuse intervention ordinarily occurs only when a child has suffered real injury." Mariner, *supra* note 18, at 35.

ing the best interests of living individuals in a pluralistic society[225] would only be magnified if applied to a fetus or embryo.[226] Traditional notions of erring on the side of life may be inappropriate when a fetus or embryo is involved. Courts recognize that a competent adult has a right to refuse treatment, even if the refusal will result in death.[227] Implicit in this legal affirmation of the right to reject treatment is the recognition that individuals may decide that the quality of their life no longer makes it worth living, and that the discontinuation of treatment may be in a person's best interests.[228] Is this concept one which should be applied to the fetus or embryo? Always favoring life for the fetus, even if that life will be short and painful, might be inappropriate and cruel. It would be extremely difficult at best for the guardian to ascertain what the "best interests" of the fetus or embryo would be in these circumstances. A guardian ad litem might not take into account the possibility of an "altruistic" fetus or embryo, one that

225. Pollock, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 RUTGERS L. REV. 505, 521 (1989).

226. "Unconceived children cannot be asked whether they would prefer not to be conceived in light of any risks . . . ." Peters, *Protecting the Unconceived: Nonexistence, Avoidability and Reproductive Technology*, 31 ARIZ. L. REV. 487, 499 (1989). Peters poses a second concern: "whether society can owe a duty to the unconceived not to harm them. Duties not to harm persons seem to presuppose their existence." *Id.* at 500.

227. The recently decided case of Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990), assumed that there is a constitutional right to refuse treatment. The clearly expressed wishes of a competent adult govern treatment decisions. When an individual in a persistent vegetative state leaves no clear indication of whether he or she would wish to discontinue nutrition and hydration prior to becoming incapacitated, the state may assert a supervening authority to preserve life, and refuse to allow family members to make decisions to terminate treatment. *See id.* at 2854–55.

228. *See* Pollock, *supra* note 225, at 521. The judiciary has, in the past, held as an underlying premise the principle that life is always better than nonexistence. This principle has led most courts to reject wrongful life claims. Wrongful life claims are brought by children born after erroneous prenatal diagnosis, or failed sterilizations. *See generally* Fain, *Wrongful Life: Legal and Medical Aspects*, 75 KY. L.J. 585 (1986–1987). Courts are reluctant to recognize such claims in part because of the preference for life, and in part because of the difficulty in assessing damages given the inherent value attached to life. Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 352 (1986) ("The notion that nonexistence may be preferable to life with severe birth defects appears to contravene the policy favoring the 'preciousness and sanctity of human life.' "); *see also* Furrow, *Diminished Lives and Malpractice: Courts in Transition*, LAW, MED. & HEALTH CARE 100 (1982). However, the establishment of the constitutional right to die implicitly recognizes that in some circumstances death is preferable to life. *See Cruzan*, 110 S. Ct. at 4916 (1990) (recognizing a constitutional right to die, but allowing to stand Missouri's rejection of parental right to terminate treatment when the parents could not prove by clear and convincing evidence that the incompetent woman had articulated her preference to die). Living wills are another example of state recognition that individual preferences regarding when life is no longer worth living should be legally binding. *See, e.g.*, Natural Death Act, CAL. HEALTH & SAFETY CODE § 7186–7195 (West Supp. 1977). Individuals may write living wills because they do not wish to live in certain circumstances, and because they do not wish to put their families through the painful, emotional and expensive care of a declining individual.

would sacrifice its potential existence to promote the life or health of another.[229] Moreover, a guardian ad litem advocating the "best interests of the fetus" might advocate confinement of the pregnant woman, thereby relegating the woman's rights to second class status. Such confinement, moreover, might be of dubious benefit to the fetus.[230]

Determining what types of behavior by pregnant women should trigger the appointment of a fetal guardian will lead courts into impossible conundrums. The questions that would need to be answered are innumerable. How would the conduct necessitating the appointment of a guardian ad litem be defined? Who would have standing to call for such an appointment? While most would agree that illegal substance abuse is potentially harmful to a fetus and should be proscribed, once courts engage the issue it would be logically difficult to justify failing to prohibit all conduct which may injure a fetus. Appointing a guardian ad litem might be justified if a woman smoked, ate "junk food," failed to seek prenatal care, engaged in strenuous exercise, worked in a hazardous environment, engaged in sexual activity when contraindicated, breathed polluted air, or lived near electric force fields or toxic waste sites. Criminalizing any or all these forms of con-

229. For a discussion of behavior in gift giving and the implications for the formal legal rules governing such behavior, see Baron, *Gifts, Bargains, and Form,* 64 IND. L.J. 155, 172–79 (1989). The premise that individuals need protection from rashly parting with their possessions is based on a belief that individuals are basically self-interested. Baron points out that empirical evidence derived from kidney donation studies indicates that the basic assumption is questionable. *Id.* at 174. If existing individuals are allowed to act out of selfless motivation, why should a fetus or embryo be precluded from doing so? For a general discussion of altruistic behavior, see ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES (J. Rushton & R. Sorrentino eds. 1981); ALTRUISM, SYMPATHY, AND HELPING: PSYCHOLOGICAL AND SOCIOLOGICAL PRINCIPLES (L. Wispe ed. 1978).

In the trust context, representation of the unborn may present problems with modification of the trust. *See* Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie,* 36 HASTINGS L.J. 563 (1985). Bird notes that "nonpecuniary factors, such as familial devotion [may be] a substitute for consideration" in trust termination cases. *Id.* at 605. She notes that legislation in Wisconsin allows for the appointment of a guardian ad litem to represent unborn or unascertained beneficiaries and provides that "[a] guardian ad litem for such beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof." WIS. STAT. ANN. § 701.12(2) (West 1981); Bird, *supra,* at 605, n.247. Applying this approach to the issue at hand, a guardian ad litem might not be able to take into account familial circumstances and advocate embryonic nonexistence in order to benefit existing family members.

230. Confinement in prison is a questionable means of ensuring healthy babies born of healthy women, as prenatal care might not be as readily available in prisons. Moreover, dietary, exercise and other restraints present in prison might actually harm the fetus. In addition, there are reports of rampant drug use in the prison system. *See* McNulty, *Pregnancy Police: The Health, Policy, and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses,* 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1987–1988); Malcolm, *Explosive Drug Use Creating New Underworld in Prisons,* N.Y. Times, Dec. 30, 1989, § 1, at 1, col. 1.

duct in the case of pregnant women—conduct that is otherwise legal—is highly problematic, and potentially counterproductive, to say nothing of invasive.

These issues illustrate the quandary that would be faced by a guardian ad litem charged with representing a fetus or embryo. The answers to these questions depend on one's individual moral and ethical views, rather than on objective legal principles. The answers, therefore, will vary from individual to individual. No objectively neutral and generally acceptable legal standards can be ascertained, set, or enforced to define the powers and responsibilities of fetal guardians.

As long as the pregnant woman and the fetus she carries are physiologically united, such intervention subordinates the woman to the fetus.[231] Civil intervention in child abuse and neglect proceedings initially aims to provide support services and guidance to keep families together.[232] As a last resort, a child may be removed from parental custody, because the child is a physically separate person. "Fetal abuse," however, cannot be prevented without actual physical intervention against the pregnant woman or, at the least, serious restrictions on her liberty.

## VII. RAMIFICATIONS OF APPOINTING FETAL GUARDIANS AD LITEM

Appointing guardians ad litem to represent the interests of fetuses in legal proceedings concerning forced medical treatment, drug prosecutions and prenatal abuse and neglect, is unwarranted and inappropriate. It is tantamount to punishing "the status of being pregnant, [which] is likely to profoundly affect the way society views women in general and to transform pregnant women from nurturers into suspects."[233]

### *A. Drug Prosecution and Forced Medical Treatments*

Supporters of the notion of fetal guardians argue that they are concerned only with women who subject the fetuses they carry to extreme hazards by their conduct.[234] Generally, this behavior

231. *Id.*

232. *See generally* Mariner, *supra* note 18, at 35.

233. *Id.* at 32. The appointment of the guardian ad litem in these cases removes decisionmaking authority and autonomy from the woman, and restricts her behavior as well. The appointment is therefore both a restriction on liberty and a punishment for activities deemed inappropriate.

234. *See, e.g.*, Rickhoff & Cukjati, *Protecting the Fetus from Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259, 266 (1989) [hereinafter Rickhoff].

involves the use of illicit substances, "the failure to take medication for mental health needs or engaging in physical acts likely to cause fetal injury with long-term consequences."[235] While these advocates contend they are not endorsing proscription of "all maternal conduct that affects, even tangentially, the health of the developing fetus,"[236] drawing the line between prohibited and permitted behavior is treacherous. Defining conduct which "poses a substantial risk of severe impairment or death to the fetus" is extremely problematic.[237] For example, Rickhoff and Cukjati expressly disavow any desire to regulate "caffeine, nicotine or social drinking,"[238] but medical studies indicate that these legal substances and activities may also have severe adverse impacts on the fetus.

> Prosecutions of pregnant women cannot rationally be limited to illegal conduct because many legal behaviors cause damage to developing babies. Women who are diabetic or obese, women with cancer or epilepsy who need drugs that could harm the fetus, women who are too poor to eat adequately or to get prenatal care could all be characterized as fetal abusers.[239]

Drawing the line poses a real obstacle to regulating the conduct of pregnant women.[240]

Recognizing the interests of what Professor Charo calls the "phantom fetus" threatens to create second class citizenship for all women

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235. *Id.*

236. *Id.* at 300.

237. *Id.*; *see also In re* Fletcher, 141 Misc. 2d 333, 533 N.Y.S.2d 241, 243 (Fam. Ct. 1988) (finding prenatal substance abuse could not be the basis for finding of child abuse or neglect):

> [n]o authority [exists] for the State to regulate women's bodies merely because they are pregnant. By becoming pregnant, women do not waive the constitutional protections afforded to other citizens. To carry the Law Guardian's argument to its logical extension, the State would be able to supersede a mother's custody right to her child if she smoked cigarettes during her pregnancy, or ate junk food, or did too much physical labor or did not exercise enough. The list of potential intrusions is long and constitute [sic] entirely unacceptable violations of the bodily integrity of women.

238. Rickhoff, *supra* note 234, at 266.

239. Paltrow, *supra* note 188, at 42.

240. Appointing fetal guardians is problematic also because it has racial and class implications. National surveys indicate that women of color and poor women are the primary victims of prosecutions for drug use during pregnancy and for compelled obstetrical interventions. *See* Chasnoff, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida,* 320 NEW ENG. J. MED. 1202 (1990) (finding that black women were reported at ten times the rate of white women, despite the fact that there were few differences between races in the rate of substance abuse during pregnancy); Kolder, *supra* note 142, at 1195 (finding that forced medical treatment of pregnant women was primarily directed against poor women and women of color); *see also* L. Paltrow, H. Fox & E. Goetz, ACLU Memorandum: Overview of ACLU National Survey of Criminal Prosecutions Brought Against Pregnant Women: 80% Brought Against Women of Color 2 (May

of childbearing age, while failing to achieve the desired end of protecting the health of fetus and woman.[241] Increasing the availability and accessibility of treatment programs and prenatal care—not the threat of sanctions and prosecutions—is a more rational and responsible approach to benefiting fetal and maternal health.[242]

As a responsible society, our desire to minimize health risks to the unborn child should be tempered by the recognition that maximizing

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7, 1990) (on file with the *Washington Law Review*) ("[R]acial and ethnic bias play a significant role in determining who is reported to authorities and who is punished.").

Recognizing fetal interests, and therefore by inference requiring the appointment of fetal guardians ad litem, also raises equal protection issues. "[A]ny governmental action that singles out women for special penalties solely because they become pregnant discriminates on the basis of gender." Paltrow, *supra* note 188, at 45; *see also* Mariner, *supra* note 18, at 40 n.37. While some of the conduct at issue, like use of illegal drugs, is regulated or proscribed for all individuals, many of the potential prohibitions would affect only pregnant women. Consumption of alcoholic beverages, for example, is conduct that is not regulated in non-pregnant adults, but that would be subject to regulation under some views of maternal duties to fetuses. Other conduct that might be subject to such intervention includes cigarette smoking and use of prescription drugs and therapies.

> The decisions in question here—what to eat or drink, when to go to the doctor, whether to have sex . . . have both procreative and non-procreative aspects. Indeed, regulating such decisions for all people . . . has no procreative significance. If states limit consumption only for pregnant women, however, they would be regulating the procreative aspect of the decision whether to drink. Such laws seek to control the incidents of procreation, infringing on a woman's power to make decisions about how she will live her life during her pregnancy.

Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of Fetal Abuse,* 101 HARV. L. REV. 995, 1000 (1988); *see also* Johnsen, *supra* note 183, at 200 n.73. Johnsen notes that the consequences of these "virtually unlimited" special restrictions would be "treating pregnant women as less than full legal persons." *Id.* at 200. The fact that the conduct involved does not in and of itself implicate fundamental rights is irrelevant. "This analysis ignores the critical fact that the constitutionally suspect governmental action that triggers heightened scrutiny is the imposition of additional burdens on women solely on the basis of their reproductive capacity." *Id.* This type of differentiation is an impermissible violation of the equal protection clause.

241. The term "phantom fetus" was coined by R. Alta Charo. Remarks at the Health Law Teacher's Conference (June 1990). Charo is extremely disturbed by instances in which fetuses and prospective fetuses are given protections greater than those afforded to existing people, usually at the expense of existing women. The concerns include exclusion from workplace due to potential hazards, withholding of the abortifacient RU-486, forced cesarians and prosecutions of pregnant women.

242. The fact that prenatal care is not universally available to pregnant women undercuts the argument that societal interests in the welfare of children and the unborn are always viewed as primary. In addition, treatment programs for substance abusers rarely address the needs of pregnant women, and often do not admit pregnant women. Mariner, *supra* note 18 at 36. The Chavkin survey indicated that 54% of drug programs in New York City refused pregnant women. A Massachusetts study indicates that only 30 beds in residential treatment programs in the state are available to women, fifteen of which are in correctional facilities. Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads,* 80 AM. J. PUB. HEALTH 483 (1990).

President Bush's veto of the Family Leave Act may indicate that comprehensive approaches to benefitting fetal and maternal health do not have institutional governmental support.

that goal at the expense of goals of autonomy and privacy may not be advisable. Valuing a potential individual's health more highly than the rights of an existing individual by regulating conduct that is unregulated when pregnancy is not at issue in effect assigns a higher value to the potential life and health of a fetus than to the rights of pregnant women.

The specter of "pregnancy police"[243] deciding when a woman has breached a particular standard of conduct might well produce unintended adverse consequences for both woman and fetus. If women fear prosecution, confinement, or the appointment of another person to dictate their behavior and to represent the interests of the fetus they are carrying against their own, they may rationally avoid contact with individuals they perceive as having the power to report them. Consequently, women who need prenatal care the most may refuse to seek it.[244] Lack of prenatal care may be far more detrimental to the health of a woman and fetus than the questionable conduct of the woman.[245]

### *B. Reproductive Technologies Cases*

Appointing guardians ad litem for fetuses poses the difficult problem of determining when fetal rights accrue, the resolution of which turns on moral, philosophical and religious premises. The Louisiana Civil Code regulations on human embryos state that:

> [a]n in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when such rights attach to an unborn child in accordance with law.[246] In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.[247]

243. McNulty, *supra* note 230, at 277.

244. As Senator Herb Kohl stated at Congressional hearings on prenatal substance abuse, "[M]others—afraid of criminal prosecution—fail to seek the very prenatal care that could help their babies and them." Paltrow, *supra* note 188, at 44 (citing *Senate Hearings, supra* note 188, at 5 (opening statement of Sen. Herb Kohl)). The statement typifies the experience of other health care workers. *See* Paltrow, *supra* note 188, at 44 (citing Affidavit of Ira J. Chasnoff, M.D., submitted in support of Defendants Motion to Dismiss Indictment, People v. Hardey, No. 87-2931-87 (Mich. Dist. Ct. Dec. 5, 1989)).

245. Drug use may be only one factor in a number of potential risks to the fetus. "Drug use goes hand-in-hand with inadequate nutrition, poor prenatal care, and poorly timed pregancies." Nolan, *supra* note 93, at 19 (1990). Inadequate prenatal care is often associated with low birth weight, a major risk factor in infant mortality. Mariner, *supra* note 18, at 33.

246. LA. REV. STAT. ANN. § 9:123 (West Supp. 1990). However, section 133 indicates no inheritance rights attach until a live birth occurs.

247. *Id.* § 9:131.

This language calls for the appointment of a guardian ad litem to ensure that the interests of the fertilized ovum are adequately represented. A number of questions are left unanswered by the statute. Would a guardian ad litem be appointed each time the implantation process was commenced, and would a different guardian be required for each embryo? If cryopreservation were contemplated, would a guardian ad litem have to assent to the freezing? If the donation of embryos were being considered by a couple, should the embryo be represented?[248] In divorce cases, when disputes arise as to whether a fertilized ovum should be thawed or implanted, should a guardian ad litem be appointed to assist in the determination of what is in the best interests of the frozen embryo? The answers to these questions will ultimately express the moral views of the guardian ad litem or the judge rather than reflect a neutral, objectively ascertainable rule about what would best serve the interests of the embryo. Such delicate moral and personal decisions are not properly amenable to legislative or judicial resolution; they are best left to the individuals most directly involved.

In the recent case of *Davis v. Davis,*[249] the trial court stated that "human life begins at conception." The court went on to use the "best interests of the child or children, in vitro" standard to find that custody of in vitro embryos should be granted to the woman.[250] Although the court used the parens patriae doctrine in its determination that it was in the "best interest of the children, in vitro, that they be made available for implantation to assure their opportunity for live birth," the court did not appoint a guardian ad litem to represent those interests.[251] On appeal, the decision was reversed and "joint control" of the embryos was granted to the couple.[252]

248. The Louisiana Code does state that "parental" rights can be renounced in favor of another married couple, as long as adoption of the in vitro fertilized ovum occurs and a child is later born. *Id.* § 130.

249. 15 Fam. L. Rep. (BNA) 2097, (Tenn. Cir. Ct. Sept. 21, 1989), *reversed,* No. 180 (Tenn. Ct. App. Sept 13, 1990). In a case involving conflicts between the gestational mother and the couple who had their embryo implanted in the surrogate, the court appointed a guardian ad litem to represent the interests of the fetus. L.A. Daily J., Sept. 10, 1990, § 1, at 1, col. 2, (discussing Johnson v. Calvert, No. 633190 (Orange County Super. Ct. 1990)). The suit was filed August 13, 1990, a month before the birth of the child. On October 22, 1990, the court ordered custody of the child to the genetic parents. Gewertz, *Genetic Parents Win Sole Custody in Surrogate Case,* L.A. Times, October 23, 1990. L.A. Times Part 1 col. 5.

250. *Davis,* 15 Fam. L. Rep. (BNA) at 2097, 2097.

251. *Id.* at 2104.

252. Davis v. Davis, No. 180, slip op. 6 (Tenn. Ct. App. Sept 13, 1990). The court pointed out that under the *Roe* approach, "as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given the legal status equivalent to that of a person already born." *Id.* at 5.

If the *Davis* court had found it necessary to appoint a guardian ad litem, separate guardians would have been required to represent the competing interests of each individual embryo, since in principle parties must be separately represented when their interests are potentially at odds.[253] Because the implantation of some embryos might reduce the chances of success for others, the embryos might have competing interests. Courts would be forced to reconcile these competing interests.

Another difficult issue is the extent to which an embryo's rights should be preserved by its guardian. For example, could a guardian for one embryo forego or delay the opportunity for implantation in order to increase the chances for another's success, even if such action might decrease the chances of the embryo represented by that guardian? If after the successful implantation of several embryos, attempts were made to reduce the number of embryos, would guardians ad litem have to be appointed before a determination was made as to whether to abort and which fetuses should be aborted? If so, would the medical judgment of the woman and her doctor be subject to opposition and review by a guardian ad litem? If a guardian ad litem is appointed because the embryo has juridical status, should the courts view the "best interests of the embryo" separately from the rights and interests of the prospective parents? If "parents" no longer wish to pursue implantation, does the guardian ad litem, as representative of the embryo, have the right to petition the court to force implantation or require donation to a couple who will pursue implantation? In the case of *Davis v. Davis,*[254] the trial judge found that under parens patriae, the best interests of these embryos required custody be given to the "mother" so that she could have the embryos implanted.[255] However, in the *Davis* case, Mary Sue Davis had previously undergone several unsuccessful attempts at implantation.[256] Since the chances of success with these embryos is unlikely, could a guardian ad litem call for implantation in a more promising candidate?

Legislation purporting to confer the status of persons on embryos and fetuses raises all the preceding issues, without providing guidelines for resolving them. Current voluntary guidelines for in vitro fertilization centers provide a better answer. The American Fertility Society maintains that the products of in vitro fertilization are property which should be treated with respect, but not given the rights and protections

253. *See e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).
254. 15 Fam. L. Rep. (BNA) 2097.
255. *Id.*
256. *Id.* at 2098.

of existing individuals.[257] Gametes and concepti should be the property of the donors. Pre-treatment agreements rather than judicially imposed standards based on the elusive "best interest" of an embryo should govern disputes. Such an approach avoids the problems inherent in according embryos separate legal status and rights.

## VIII. CONCLUSION

Guardians ad litem should not be appointed for fetuses or embryos. First, as a matter of current constitutional law, these entities are not persons, and therefore should not be accorded the same protections enjoyed by existing children. Second, the approach of some courts in applying standards currently used for the appointment of guardians ad litem for existing children is inappropriate for fetuses and embryos. There is no escaping that the fetus resides within a living woman, whose autonomy and privacy should not be diminished by her pregnant condition. Third, as a practical matter, the appointment of guardians ad litem renders pregnancy an adversarial relationship between woman and fetus, a phenomenon that is ultimately inimical to the promotion of the interests of both woman and fetus. Although promoting healthy babies born of healthy women is a laudable concern, appointing guardians ad litem for fetuses and embryos can, in the long run, only hinder efforts to promote that goal.

257. American Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY AND STERILITY 17–18 Supp. 2 (1990).